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No. 341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

H. L. DILLON, JR., ET AL.,

Petitioners,

v.

MICHEL T. HALBOUTY, ET AL.,

Respondents.

BRIEF OF RESPONDENT PETER HENDERSON OIL COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT PETER HENDERSON OIL COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of The United States:

Respondent, Peter Henderson Oil Company[1] ("Henderson"), files this, its Brief in Opposition to the granting of the Petition for Certiorari, and respectfully shows the Court the following, to-wit:

PREFATORY STATEMENT

This is a special statutory appeal under Article 6049c, Texas Civil Statutes, from an order of the Texas Railroad

[1] In the proceedings before the Commission, the District Court, the Supreme Court of Texas and this Court, Henderson was and is acting for itself and as operator for its co-owners (S.F. 681-6) and, as it is required by its leases and the law, for its more than 400 royalty owners (S.F. 64, Henderson Ex. 71).

Commission, which statute provides, among other things, that "such suit shall be advanced for trial and determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court," (Section 8) and that it is "the duty of the (Texas) Supreme Court immediately to set down said cause for hearing and decide the case at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character." (Section 11). The Texas Supreme Court accepted jurisdiction of the case as a direct appeal from the Trial Court (i.e., instead of appealing first to the intermediate appellate court, the Texas Court of Civil Appeals) pursuant to Texas Supreme Court Rule 499-a, which permits such appeals upon "questions of law only." See Appendix, page 41a hereof. Such Court has held that the only issue in such cases is whether or not the order is reasonably supported by substantial evidence, and that this is a question of law only. *Thomas* v. *Stanolind Oil & Gas Co.* (1946), 145 Tex. 270, 198 S.W. 2d 420; *Railroad Commission* v. *Sterling Oil & Gas Co.* (1949), 147 Tex. 547, 218 S.W. 2d 415.

As pointed out to the Texas Supreme Court in Henderson's Reply to Petitioners' Amended Motion for Rehearing:

> "Nearly three and a half years have now elapsed since Henderson filed an application with the Railroad Commission for relief from the unjust and confiscatory proration order involved in this suit. Nothing can be done to restore the gas and condensate drained from the Henderson properties during the pendency of this litigation, and each day Henderson's loss by drainage increases. The enormity of such loss is readily apparent from the fact that in October, 1960, Henderson's aggregate loss over the 13-year remaining life of the Field was estimated at $13,450,000, and on a straight line basis, Henderson's loss by drainage is in excess of $1,000,000 per year. Sixteen months of the 13-year

period have already passed. We submit that in fairness to all concerned, the time has come to grant this Appellant the relief to which it is so justly entitled by the the prompt rendition of this Court's judgment and issuance of the mandate in accordance with its opinion dated February 14, 1962." (Reply of Appellant Peter Henderson Oil Company to Appellees' Amended Motion for Rehearing and Supplemental Brief, p. 16)

The serious consequences of further delay to Henderson was recognized by the order of the Supreme Court of Texas dated August 20, 1962, refusing the Motion of Petitioners to delay issuance of the mandate and execution and enforcement of its Judgment beyond October 15, 1962, and stating that the stay would extend only until October 15, 1962, and "not thereafter unless further delay of issuance of the mandate and execution and enforcement of the judgment of this Court is ordered by the Supreme Court of the United States on petition made to that Court."

This Respondent submits that the Petition for Certiorari is frivolous and presents no federal questions of substance or otherwise. It serves the purpose of postponing the promulgation of a new gas proration order by the Texas Railroad Commission to take the place of the one declared invalid by the Texas Supreme Court.[2]

As grounds for Henderson's position, the following points are submitted:

(1) The Railroad Commission Of Texas, The Main Party Defendant, Has Not Joined In The Petition

Petitioners were mere intervenors in an appeal to the District Court of Travis County, Texas brought by Henderson and the other Respondents, as Plaintiffs, against the Texas Railroad Commission, as Defendant, to set aside as

[2] See notice of new hearing called by the Railroad Commission, Appendix page 242.

unreasonable, arbitrary and confiscatory to Respondents, a gas proration order for the Port Acres Field, Jefferson County, Texas, which the Texas Supreme Court found caused and will continue to cause the drainage of tremendous quantities of gas and liquid petroleum hydrocarbons from Henderson's properties to the properties of Petitioners and others. *The Texas Railroad Commission, the only necessary party Defendant to Respondent's appeal*[3] *has acquiesced in the decision of the Texas Supreme Court by not joining in the Petition for Certiorari or filing one of its own.* Since the Railroad Commission was the only necessary party, the result of this case would have been precisely the same even if Petitioners had not intervened.

In their original Brief For Appellees, H. L. Dillon, Jr., et al. filed in the Texas Supreme Court, Petitioners said:

> "The proration orders attacked in this case are legislative orders, in that they apply generally to all producers in the Port Acres Field and are prospective in operation. Therefore tests which would apply to judicial or quasi-judicial decisions cannot properly be applied to the proration orders involved in this case. * * * In this situation, it is submitted that the Texas decisions are correct in holding that the reviewing court * * * will simply test the validity of the order in question on the basis of whether it is supported by substantial evidence *relating to its effect upon the complaining parties.*" (Pages 24, 26-27.)[4]

Although Petitioners have now changed their tune since the Texas Supreme Court held that the order in suit *is not supported by substantial evidence relating to its effect upon the complaining parties,* it seems too plain to admit of doubt that Petitioners have no standing to assert the valid-

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[3] *Trapp* v. *Shell Oil Company* (1946), 145 Tex. 323, 198 S.W. 2d 424.

[4] All emphasis is supplied by the writers of this Brief unless otherwise indicated herein.

ity of the order in suit merely on the ground that it is fair to them; no attempt being by them made to show that the order is fair and reasonable as to all operators. An order will not stand merely because it treats some operators well, if it is unjust, unreasonable and discriminatory as to others. Our laws protect those who are injured, not those who seek to preserve a special privilege.

(2) No Novel Questions Are Presented

The only issue before the Texas Supreme Court was whether or not a gas proration order for the Port Acres Field, Jefferson County, Texas, was invalid as to Respondents because it permitted the drainage of tremendous quantities of gas and liquid petroleum hydrocarbons from Respondents' properties (particularly Henderson) to the properties of Petitioners and other operators. The basis of that Court's holding is as set forth in the next to last paragraph of its opinion, wherein it held the proration order in suit invalid because "it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent." In a preceding portion of the opinion, the Court said:

> "It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract, he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land." (Appendix, p. 19a).

In *Thompson* v. *Consolidated Gas Utilities Corp.* (1936), 300 U.S. 55, 81 L. Ed. 510, this Court construed the same statute here involved, Article 6008, Texas Civil Statutes, as authorizing and requiring, no issue of waste being involved, the Texas Railroad Commission to prorate gas so as to prevent drainage from one's property and held invalid a Railroad Commission order which did not do so.

In *Cozelius* v. *Harrell* (1945), 143 Tex. 509, 186 S.W. 2d 961, the Texas Supreme Court cited *Thompson* v. *Consolidated Gas Utilities Corporation* as an authoritative construction of Article 6008, and held that the statutory criteria in Article 6008 "to adjust correlative rights" and "to compel ratable production" so as to give each owner his "fair share" is definite and certain.

After the District Court judgment in the instant case but before it was decided by the Texas Supreme Court, such Court held, in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), Tex. , 346 S.W. 2d 801, that an identical gas proration order for the Normanna Field, Bee County, Texas, was invalid in that it caused, and did not prevent, drainage.

These are the only cases, other than the instant one, by the highest Court of this State or by this Honorable Court interpreting Article 6008.[5] *There is no reasonable basis for the slightest difference of opinion as to their application to the undisputed facts of this case.*

(3) No Loss Can Possibly Result To Petitioners From The Invalidation Of The Present Gas Proration Order

In their original Brief filed in the Supreme Court of Texas, the Petitioners stated:

> "As far as proration is concerned, the cancellation of the $\frac{1}{3}$-$\frac{2}{3}$ allocation formula would give appellants (Henderson and the other Respondents) no relief unless the Railroad Commission entered some other allocation formula on the basis which appellants urge, substantially in proportion to gas reserves in place. If, after the $\frac{1}{3}$-$\frac{2}{3}$ formula were cancelled by the Court,

[5] For a holding of the Texas Supreme Court that an oil proration order which causes drainage is likewise invalid, see *Marrs* v. *Railroad Commission* (1944), 142 Tex. 293, 177 S. W. 2d 941, discussed at pages 22-24 of this Brief.

> the Commission simply did nothing, then the gas wells in the Port Acres Field would either be able to produce without restrictions or they would be limited only by the Railroad Commission's Statewide Rule No. 25, which allows each gas well to produce not to exceed 25% of its potential capacity. *In this situation, the wells on the small tracts would be able to produce on at least an equal basis with the wells on the larger tracts, since the small tract wells have high potentials.*" (Petitioners' original Brief, p. 9.)

Again, in their Original Motion for Rehearing to the Supreme Court of Texas, Petitioners made it clear that they, the owners and operators of the small tract wells, would suffer no injury by producing under Statewide Rule 25 until a new gas proration order is adopted by the Railroad Commission when they said:

> "Under the [illegible] proration order, each well on a large unit produces *five times* as much as a well on a small tract. (Page 31, emphasis here is that of Petitioners).
>
> . . . .
>
> "All of the wells drilled on the small tracts are wells of high producing capacity, better than the average for the field, and if the allowables were distributed on the basis of daily producing capacity of each well, as compared with the aggregate daily producing capacity of all gas wells in the Field, then *the allowable of each well on a small tract would be at least substantially equal to the allowable of each well on a large unit.*" (Page 16)

Thus, as a result of the invalidation of the present gas proration order and unless and until the Railroad Commission shall enter some new gas proration order, Petitioners have told the Supreme Court of Texas they will gain at least 200% in their rate of production.

As this Court said in *Market Street R. Co.* v. *Railroad Commission of California* (1944), 324 U.S. 548, 89 L. Ed. 1171:

> "But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties."

(4) Petitioners' Claims Are Premature

Petitioners real complaint is not what the Supreme Court of Texas has done, but what the Railroad Commission of Texas may hereafter do and is therefore premature. *Republic Natural Gas Co.* v. *Oklahoma* (1947), 334 U.S. 62, 92 L. Ed. 1212; *Parker* v. *County of Los Angeles* (1949), 338 U.S. 327, 94 L. Ed. 144; *LaClede Gas Light Company* v. *Public Service Com. of Missouri* (1937), 304 U.S. 397, 82 L. Ed. 1422; *United States* v. *Public Utilities Com.* (1952), 345 U.S. 295, 97 L. Ed. 1020, *West Virginia Motor Truck Ass'n* v. *Public Service Commission of West Virginia* (1954), 123 F. Supp. 206, aff'd, 348 U.S. 881, 99 L. Ed. 693.

In its opinion, the Texas Supreme Court took occasion to say:

> "• • • the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated.
>
> "• • • •
>
> "• • • • but we are confident that with the trained personnel at their disposal a much nearer approximation can be made (by the Railroad Commission), giving to *all parties* an opportunity to produce a fair share of the minerals underlying the field with ratable allowables that will be more nearly equitable than appears in the case before us." (Appendix, ppgs. 17a, 21a).

Is this Court prepared to hold that no such gas proration order can be made by the Texas Railroad Commission? It refused to do so under similar circumstances in *Hunter Co.* v. *McHugh* (1943), 320 U.S. 222, 88 L. Ed. 5, when it said:

> " • • • for we cannot say that no order could be made by the Commissioner which would apportion the production • • • in a manner which would be consonant both with the requirements of the statute and the Federal Constitution. • • • It will be time enough to consider the constitutionality of any particular apportionment and distribution of costs when we have before us the specific provisions of an order directing them which has been subjected to the scrutiny of the state court."

(5) Petitioners Will Be Afforded A New Trial On All Relevant Issues Before The Texas Railroad Commission

Petitioners' contention that their Constitutional rights have been infringed because of the failure of the Texas Supreme Court to remand this case to the District Court to receive certain evidence Petitioners say they desire to present, relates solely to *dicta* in the Court's opinion, was raised for the first time in an Amended Motion for Rehearing, and was not the basis or effect of the Court's opinion, the real effect of which is to remand this case to the Railroad Commission for a new and proper order after notice and hearing as required by Texas law. Article 6008, Section 12; Article 6036a, Texas Civil Statutes.

The attention of this Court is now invited to certain specific portions of the Petition for Certiorari under the following headings:

OPINIONS BELOW

At pages 2, 7, 10 and 13 of the Petition, the Texas Court of Civil Appeals case of *Halbouty* v. *Darsey* (1959), 326 S.W. 2d 528, writ refused, N.R.E., is referred to as a "companion case." The Court of Civil Appeals' opinion in such case is copied in full as Appendix "C", beginning at page 64 of the Petition.

The term "companion case" is a misnomer. *Halbouty* v. *Darsey* was tried and finally disposed of (Rehearing denied, August 5, 1959) by the Texas Court of Civil Appeals before the pleadings in the instant case were even filed in the trial court (August 14, 1959), and nearly three years before the order of the Texas Supreme Court overruling Petitioners' Amended Motion for Rehearing in the instant case. The decision in *Halbouty v. Darsey* was by an inferior appellate court while the decision sought to be reversed by Petitioners in the instant case is by the Texas Supreme Court. Different orders of the Railroad Commission were involved and different parties were involved.

Although the Texas Supreme Court refused to review the decision of the inferior court in the *Darsey* case[6] it did so with the notation "writ refused, no reversible error." According to Texas Supreme Court Rule 483, this means that "the Supreme Court (was) not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but (was) of the opinion that the application presents no error which requires reversal."

It is respectfully submitted that the reference to the

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[6] Such case, as well as the opinions in the case of *Humble Oil & Refining Co.* v. *C. C. Cook et al* (Tex. Civ. App. 1948), 215 S.W. 2d 383, cited at page 21 of the Petition for Certiorari, and *Railroad Commission* v. *Humble Oil & Refining Co.*, (Tex. Civ. App., 1946), 193 S.W. 2d 824, cited at page 6 of the Petition for Certiorari, should not be regarded as containing authoritative statements of Texas law in view of Texas Supreme Court Rule 483.

opinion of the Court in *Halbouty* v. *Darsey* as one of the "Opinions Below" is inaccurate and misleading and not in compliance with this Court's Rule 23.

JURISDICTION

This Court has no jurisdiction of this controversy under Section 1257(3) of Title 28, United States Code, because:

(a) The validity of no treaty or statute of the United States is here involved;

(b) No title, right, privilege or immunity of Petitioners under Section 1 of the Fourteenth Amendment to the Constitution of the United States (the only Federal Constitutional or statutory provision cited by Petitioners) has been infringed;

(c) The Judgment is not "final" within the meaning of Section 1257, Title 28, United States Code, as interpreted by this Court in *Republic Natural Gas Co. v. Oklahoma* (1947), 334 U.S. 62, 92 L. Ed. 1212, and the other cases cited at page 8 hereof;

and,

(d) No Federal issues are here involved.

The only issue before the Court was as stated by the Petitioners in one of their Briefs to the Texas Supreme Court before the necessity of framing issues for a Petition for Certiorari arose, as follows:

> "* * * Our position is that the owners of these wells (Petitioners' wells) are *legally entitled*[7] to produce the gas and condensate which the evidence in this case shows that they will recover, under judicial decisions establishing the law of capture as a property right and recognizing the natural advantages of wells drilled on small tracts and their right to recover at least enough gas to pay the cost of drilling and operating, plus a

[7] Emphasis here is that of Petitioners.

> reasonable profit." (Reply Brief for H. L. Dillon, Jr., et al., p. 12);

regardless of the fact, as the Texas Supreme Court found (Appendix, page 12a), that in excess of 90% of such production will be drained from others' property.

It was and still appears to be Petitioners' contention that because of certain cases by the inferior Texas Courts of Civil Appeals which the Texas Supreme Court did not choose to review but refused the writs with the notation "no reversible error," Petitioners have a vested property right regardless of the consequences to their neighbors, to produce "enough gas to pay the cost of drilling and operating, plus a reasonable profit." The Texas Supreme Court has held that Petitioners have no such property right. It is submitted that the law of Texas has not changed in this respect as Petitioners seem to think. But even if the opinion of the Texas Supreme Court should evidence such a change, this would afford Petitioners no grounds for review by this Court. As this court said in *Patterson* v. *Colorado* (1906), 205 U.S. 454, 51 L. Ed. 879:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the constitution of the United States is not infringed. * * * But, in general, the decision of a Court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th amendment merely because it is wrong or because earlier decisions are reversed."

And in *Nickel* v. *Cole*, 256 U.S. 222, 225, 65 L. Ed. 900, 905, 41 S. Ct. 467, the Court said:

> "But the answer to this is that when, as here, there is no pretense that the (State) court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong."

QUESTIONS PRESENTED FOR REVIEW

(As Stated by Petitioners)

1. In the first of Petitioners' Questions for Review, this Court is asked to assume jurisdiction of this case because, Petitioners say, the Texas Supreme Court should have remanded the case to the District Court, instead of rendering judgment for Respondents, in order to allow Petitioners to offer certain evidence. As we have already pointed out, the real effect of the Texas Supreme Court's decision is to remand this case to the Texas Railroad Commission so that, after notice and a hearing, it may devise a new proration order which will treat all parties fairly and justly. But even if this were not so, surely the question framed by Petitioners is not "a federal question of substance" within the meaning of this Court's Rule 19. As this Court said in *United Gas Public Service Co. v. Texas* (1937), 303 U.S. 123, 82 L. Ed. 702:

> "With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court and on appeal. It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. *The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements.*"

In addition, it is submitted that Petitioners are incorrect in stating that the Texas Supreme Court considered evidence of the offers made to Petitioners to unitize their leases with Respondents' leases to be material to the issues decided by it, as stated at page 3 of the Petition for Certiorari. The fact is the Court held "no such problem is before us." See page 22a of the Appendix to this Brief. Moreover, it is incorrect to state that Petitioners "have not had a chance to offer their evidence on this issue," or to infer, as Petitioners do, that they will not still have such a chance. Petitioners had such an opportunity at the hearing held by the Texas Railroad Commission, (the "primary fact finding agency" under Texas procedure relating to review of Railroad Commission orders), had such an opportunity in the District Court, and will have still another opportunity to offer any such evidence as may be relevant at the new hearing to be held by the Texas Railroad Commission after this litigation is terminated. See the discussion of these matters at pages 33-36 hereof, and see Notice of Hearing at page 24a in the Appendix hereto.

2. In their second Question for Review, Petitioners ask this Court to decide that "there is no statute in Texas authorizing or providing any procedure for compulsory unitization of separate tracts and that there is not any statutory or other reasonably definite legal standard by which the fairness or validity of an offer of unitization can be determined."

This would appear to be a large order for the Court to fill under the record now before it. Although no question of "compulsory unitization" has ever been an issue in this case, Petitioners' second Question for Review is apparently directed at the statement in the Texas Supreme Court's opinion to the effect that "While the (Texas) statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Rail-

road Commission" (see the first paragraph on page 22a of the Appendix to this Brief), and to the Court's holding herein and heretofore that the Texas gas proration statute, Article 6008, Texas Civil Statutes, does provide reasonably definite standards (page 6, supra). It seems clear that no Federal question is raised thereby.

In *Mobil, J. & K. C. R. Co.* v. *Mississippi* (1907), 210 U.S. 187, 52 L. Ed. 1016, this Court said:

> "There is nothing in the statutes or Constitution of the United States which prevents a state from creating a board of railroad commissioners, and what powers the board shall have will depend on the law creating them, of which the courts of the state are the absolute interpreters * * *. The power of the commission, and the effect of its order, depended upon the statutes of the state, and of them, as we have said, the [state] supreme court is the absolute interpreter."

Again, in *Railroad Commission of Texas* v. *Pullman Co.* (1940), 312 U.S. 496, 85 L. Ed. 971, this Court said:

> "* * * The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas."

See also, *Atlantic C. L. R. Co.* v. *North Carolina Corp. Comm.* (1906), 206 U.S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398; *Nelson* v. *County of Los Angeles* (1960), 362 U.S. 1, 4 L. Ed. 2d 494, *Clay* v. *Sun Insurance Office, Ltd.* (1960), 363 U.S. 207, 4 L. Ed. 2d 1170; *Scripto, Inc.* v. *Carson* (1960), 362 U.S. 207, 4 L. Ed. 2d 660; and *Milk Wagon Drivers' Union of Chicago, Local 753* v. *Meadowmoor Dairies, Inc.* (1940), 312 U.S. 287, 85 L. Ed. 836, wherein (the last cited case) this Court said:

> "To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state * * * tends to discredit the great immunities of the Bill of Rights."

3. In Question No. 1., Petitioners ask the Court to assume that Petitioners did not have a hearing (and impliedly, will not have another) on the fairness and validity of unitization offers made to them by Respondents. However, in Question No. 3., Petitioners ask the Court to assume that they had or will have such a hearing, but only after they have decided to reject the offers. It would appear obvious that either Question No. 1. is the real Question for Review and Question No. 3. is purely hypothetical, or that Question No. 3. is Petitioners' real Question for Review and Question No. 1. is purely hypothetical. As this Court has made it clear in numerous opinions, it is improper to call upon it to decide purely hypothetical questions and it will not do so. Examples are *Alabama State Fed. of Labor* v. *McAdory* (1944), 325 U.S. 450, 89 L. Ed. 1725; *Asbury Hospital* v. *Cass County* (1945), 326 U.S. 207, 90 L. Ed. 6; *Rice* v. *Sioux City Cemetery* (1954), 349 U.S. 70, 99 L. Ed. 897, and in the last cited case, the Court said:

> "But this Court does not sit to satisfy a scholarly interest in such issues. * * * 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

As we have already indicated, this litigation resulted from the refusal of the Texas Railroad Commission to change its method of proration; not from an order of the Railroad Commission (which we hope will soon be entered) prorating the production of gas in the Port Acres Field on a reserves or some other reasonable basis and requiring

all producers to comply therewith. If an order of the latter type is entered, Petitioners will then be entitled to allege and show, if they can, such special facts and circumstances as may exist why they should have their allowables fixed on some different basis. As is made clear by the cases cited at pages 34 and 35 hereof, the Supreme Court of Texas could not have remanded the case to the District Court to receive evidence on any such issue because the Texas Railroad Commission has not passed upon such an issue or yet had occasion so to do.

The effect of the Supreme Court's Judgment was simply to remand this matter to the Railroad Commission for hearing and the entry of a reasonable order and in connection therewith to consider and pass upon all fact issues then before it. As to Petitioners' contention that any such hearing will be held only after they have made their investments, the Court's attention is directed first, to the fact that the question fails to inform the Court that all such investments were made *pendente lite* after the commencement of these proceedings to set aside the order Petitioners claim to have relied upon, and second, the fact of such *pendente lite* investments and the effect thereof can be taken into account by the Texas Railroad Commission, to such extent as it may deem proper, in establishing a new plan of gas proration for the Port Acres Field.

When similar "Questions for Review" were presented to this Court in *Asbury Hospital* v. *Cass County* (1945), 326 U.S. 207, 90 L. Ed. 6, the Court said:

> "We are thus asked to pass on the constitutionality of a possible application of the state statute in advance of its application to appellant, and of its authoritative construction by the state courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This court is without power to give advisory

> opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute whose constitutional validity is drawn in question, is to be applied."

4. The fourth Question for Review would have the Court decide that the Fourteenth Amendment to the Constitution of the United States guarantees Petitioners the right to drain gas from Respondents (the fact of such drainage having been found by the Texas Supreme Court and admitted by Petitioners) to the extent necessary to recoup a "return on their investments plus a reasonable profit." This remarkable contention would require the Court (i) to annul prior decisions of the Texas Courts and this Court as to the non-existence of any right to drain oil and gas from one's neighbor, (ii) to prorate the production of gas in a manner different, so far as we know, from the methods employed by any State, and (iii) to sit as a super appellate regulatory agency as to each producer in every oil and gas field in this country. It seems obvious that Petitioners speak in the wrong forum.

As this Court made it clear in *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.* (1939), 310 U.S. 573, 84 L. Ed. 1368:

> "Whether, as contended by the respondent, the maximum figure set by the Commission is too high in that it leads to the capture of oil from beneath its leases by neighboring operators, and whether a lower limit might suffice to assure profitable production — these questions take us into that debatable territory which it is not the province of the Federal Court to enter.
>
> . . .
>
> "Plainly these are not issues for our arbitrament."

Subsequently, in *Burford* v. *Sun Oil Company* (1942), 319 U.S. 315, 87 L. Ed. 1424, this Court said:

> "The prevention of confiscation is based on the premises that, in so far as these privileges are compatible with the prevention of waste and the achievement of conservation, each surface owner should be permitted to withdraw the oil under his surface area, *and that no one else can fairly be permitted to drain his oil away.* * * * By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."

At page 12 of their Reply Brief filed in the Texas Supreme Court Petitioners say "We have never contended and we do not now contend that the justification for the ⅓ - ⅔ formula is 'that without such formula the small tract operators will not be permitted to recover the approximately $50,000 (or less) in reserves underlying their respective tracts.'" Petitioners seek much more; the right to produce the gas reserves of Respondents through Petitioners' wells.

Similar contentions were asserted by the Plaintiffs in the landmark case of *Marrs* v. *City of Oxford* (C.C.A., 8th, 1929), 32 F. 2d 134, cert. den. 280 U.S. 573, 74 L. Ed. 625, wherein the Court said:

> "But looking to the substance of things, as equity does, what are the rights of plaintiffs that will be encroached upon or denied to them by the enforcement of this ordinance? It is not the mere right to drill a well on one or two lots at great cost and stop with that, or to take the proportionate part of the oil and gas in the pool that might be said to lie under or be fairly attributed to those lots. The obvious purpose was to reach the pool as quickly as possible and take all of the oil and gas obtainable before others could get it, thus seriously encroaching upon and probably

destroying the same rights of adjoining lot owners. If one or more lot owners have given a lease for which no permit is obtainable their lessee may join a lessee who has a permit in the same block on terms that are fair to both lessor and lessee. If a lot owner has not given a lease he is protected by the asking in a fair proportion of the mineral produced by a permittee. The regulations make every effort to protect, rather than to destroy rights. They extend equal opportunity to all who have an interest and eliminate the race between those having equal rights in a common source of wealth, so that some may not take all and leave others with nothing. • • •

" • • • •

" • • • The basis of a statute, suggested in the Indiana case, is the governmental power to equally protect each surface owner in his right to a common fund. Complaint is made that the city was not vested with that power. Let it be conceded; still it does not follow that a court of equity will lend its aid to one in his effort to take all of a fund in which there is a community interest. The bill seems to us to be wholly without merit and the judgments of dismissal are

"Affirmed."

REGARDING PETITIONERS' STATEMENT OF THE CASE

Petitioners' Statement of the Case is both inaccurate and incomplete. Some of the inaccuracies are these:

1. *That "this case involves only the question of correlative rights between the big tract operators on the one hand and the small tract operators on the other hand."* (Page 5 of the Petition for Certiorari)

As evidence of the complete inaccuracy of such statement, the court need only refer to the following, which is taken from pages 8 and 9 of the "Post-Submission Brief for Ap-

pellees H. L. Dillon, Jr. et al." (these same Petitioners) filed in the Texas Supreme Court:

> "This case * * * is not just a controversy between the producers owning large acreage and those having small acreage.
>
> * * *
>
> "Henderson's leases are located in the western half half of the field (where the townsite wells are also located), where the gas sands are as much as ten times as thick as the sands in the eastern part of the field, according to the estimates of the expert witnesses. Therefore, *Henderson* * * * refused to align itself completely with the (other) plaintiffs in the District Court (S.F. 36, 140) and *attacks the allowable granted to the large tracts in the eastern side of the field*, owned by the appellants, Halbouty, Meredith and Pan American, *almost as vigorously as it attacks the much smaller allowables granted to the wells drilled on the small tracts.*" (Pages 8 and 9)

We also point out that Petitioners' statement, at page 5 of their Petition, completely overlooks the fact that Henderson's regular sized units are composed of the more than four hundred town lot tracts, comprising approximately 950 surface acres, whose owners along with Henderson have endeavored to comply with the Railroad Commission proration unit rules (Rules 1 and 2 of its Order, see pages 27 and 28 hereof) of not more than one well per 160 surface acres (plus 10% tolerance). When considered in the light only of small tracts, this is really a case of several hundred acres of small tracts whose owners have endeavored to comply with Railroad Commission unit rule requirement versus 20 acres of small tracts whose owners have elected not to comply.*

* In its opinion the Texas Supreme Court said "the case here is principally one of small tracts that have been unitized against small tracts where owners have preferred not to unitize." Appendix, page 15a.

Henderson plead and proved that the order in suit would cause the loss by drainage of approximately 42% of its gas reserves remaining as of August 1, 1959, and that this drainage would flow in almost equal portions from the Henderson properties to the town lot wells of Petitioners, they being permitted under the order to produce 42.953 billion cubic feet of gas in excess of their reserves, and to the thin sand wells of other regular unit operators, they being permitted to produce 46.919 billion cubic feet of gas in excess of their reserves. See Henderson's Exhibits 62A and B and 63. Thus, even if no town lot wells were involved in this case, the order in suit would still be invalid as to Henderson because of the loss by drainage to the thin sand regular units.[9]

Such was the precise holding of the Texas Supreme Court in *Marrs* v. *Railroad Commission* (1944), 142 Tex. 293, 177 S.W. 2d 941. In that case the field was originally prorated as three separate fields, viz., the Gulf-McElroy, the McClintic, and the Church-Fields fields, but on March 5, 1941, the Railroad Commission declared all three to be one common reservoir. The Field was prorated on the basis of one-half per well and one-half for the acreage potential productivity as applied to unitized acreage. Marrs contended that the Church-Fields area was thin sand while their Gulf-McElroy area was thick sand; that the Church-Fields area was densely drilled and produced more heavily than the Gulf-McElroy resulting in a low pressure area in the thin sand part of the Field; that drainage was to this low pressure area and from Marrs' properties and that the proration order in suit continued rather than prevented this adverse drainage condition. The trial court made find-

[9] At page 31 of their original Brief filed in the Texas Supreme Court, Petitioners argued:

> "Actually it is also a fight between different owners of large tracts, as to how the allowable should be divided between the large tracts *even if the small tracts are disregarded.*"

ings of fact that drainage of oil from the Marrs' properties in the Gulf-McElroy area to the properties of others in the Church-Fields area was taking place and that 7 million barrels of oil had already been lost.

The Texas Supreme Court held the order invalid as applied to Marrs, saying:

> "As previously stated, this suit was brought both as a statutory suit under Article 6049c, Section 8, Vernon's Annotated Civil Statutes, to test the validity of the Railroad Commission's proration orders and as a bill in equity to restrain the Commission from restricting production in the field in such manner as to constitute a taking of plaintiffs' property without due process of law. It was charged that the orders of the Railroad Commission were invalid because they were unreasonable, arbitrary, and discriminatory, and amounted to a confiscation of petitioners' property. The suit was for the purpose of trying out these issues.
>
> "• • • Every owner or lessee is entitled to fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation. Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 131 S.W. 2d 73; Railroad Commission of Texas et al. v. Gulf Production Co., 134 Tex. 122, 125, 132 S.W. 2d 254.
>
> "Under the findings of the trial court the allowables as fixed by the Railroad Commission for the two areas are entirely out of proportion to the potentials thereof. *They are not in proportion to the oil under the different areas. It is very evident that petitioners are not being permitted to mine their just proportion of the oil.* There is several times as much oil underlying petitioners' land as there is under the land in the Church-Fields area, yet those in the Church-Fields area are being permitted to mine nearly as much oil as are petitioners. As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But

the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.

"• • •

"This is not a case of mere waste in which the Commission has exercised the sound discretion invested in it to conserve our natural resources. As previously stated, the orders of the Railroad Commission here complained of *have the effect of taking one's property and giving it to another under circumstances where the evidence shows that this is not necessary in order to conserve the natural resources.* In Thompson v. Consolidated Gas Co., 300 U.S. 55, 80, 57 S. Ct. 364, 376, 81 L. Ed. 510, 524, it was said: 'And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' See other authorities cited therein.

"It follows that the orders of the Railroad Commission here complained of are invalid, and the trial court properly struck them down."

Such holding of the Texas Supreme Court in the *Marrs* case was reaffirmed by such court in holding invalid another "⅓ - ⅔" gas proration order in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), Tex. ..., 346 S.W. 2d 801.

2. *That the Texas Supreme Court reversed and rendered the judgment of the Trial Court "because there was an indication in the record by bill of exception that petitioners had been offered the rights to unitize or pool their lands with respondents' properties"* (p. 5) *and that this was the basis of the Court's decision* (p. 9).

It is submitted that no fair minded person could so construe the Texas Supreme Court's opinion, especially in

view of its statement contained in the same paragraph as its reference to Respondents' Bill of Exceptions in the District Court, that "no such problem is before us." Appendix p. 22a).

No such problem was before the Texas Supreme Court. The proration order in suit did not treat Petitioners unfairly; they sought to sustain it. Nor were Petitioners thereby required to accept proration on some basis other than the ½ - ½ formula because they had declined an opportunity to pool their small tracts with larger tracts. The Texas Supreme Court simply held that the proration order in suit was unreasonable, arbitrary and confiscatory as to Henderson, leaving it up to the Texas Railroad Commission to promulgate another order which will treat all parties (small large tracts, thick or thin sands) fairly and justly and being careful to make it clear that:

> "• • • the Court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors;"

and specifically, saying:

> "We are limited to passing upon the validity of the order as promulgated."

Previously, in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), Tex. , 346 S.W. 2d 801, the Texas Supreme Court said:

> "• • • A court can only pass on the validity of a rule or order when properly presented to it for review. The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property. As is provided in said Article 6008, Section 22, the Commission is given broad discretion in accomplishing the purpose of giving each party an op-

portunity to produce its fair share of the gas in the reservoir."

3. *That "the operational effect of the Texas Supreme Court's decision is that the Railroad Commission's proration rules * * * in many oil and gas fields in Texas, involving thousands of operators and investors, have been declared invalid. * * *"* (Pages 5 and 6 of the Petition)

Any reader is at a loss to understand why Petitioners would make any such statement to this Court. Two of the same attorneys whose names appear on the Petition for Certiorari were attorneys of record in *Atlantic Refining Company* v. *Railroad Comm. of Texas* (1961), .. Tex. , 346 S.W. 2d 801, a case involving an identical gas proration formula also held invalid by this Court, wherein the same argument was made and the Texas Supreme Court made it clear that it was not going to entertain suits to set aside proration orders which had been in effect for long periods without complaint, saying:

> "We are in agreement * * * that where producers have acquiesced in and have failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain."

4. *To the effect that Petitioners will suffer "heavy financial loss * * * from a striking down of the 1/3-2/3 alocation formula."* (Page 9 of the Petition).

The true effect of the striking down of the order aparently will be to permit Petitioners to produce at a rate approximately 200% greater than under the order in suit. See page 7 hereof. This Court will not speculate as to the possible effect on Petitioners of the as yet unknown terms of such future order as the Texas Railroad Commission may hereafter promulgate.

As this Court said in *American Book Company* v. *Kansas*, 193 U.S. 49, 48 L. Ed. 613:

> "But that suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over, and is limited by, the conditions of the case now before us."

5. *The inference that Petitioners drilled their small tract wells before the administrative proceedings resulting in this litigation began.* (Pages 19 and 20 of the Petition).

The true facts are (as set out in some detail under Respondents' Statement of the Case below) that all of Petitioners' wells were commenced during the pendency of these proceedings and after Henderson's application for a change in field rules was filed and notice of the hearing given. This is what the Texas Supreme Court meant when it said that Petitioners "drilled their wells at their own risk." It meant that Petitioners voluntarily elected to drill all of their wells *pendente lite* and that there would be no loss in investments whatever to Petitioners (by reason of what the Railroad Commission may hereafter do as a result of the Texas Supreme Court's decision in the case), if Petitioners had awaited the outcome of these proceedings rather than having proceeded, either arrogantly or recklessly, *pendente lite*.

RESPONDENT'S STATEMENT OF THE CASE

Field rules were first established for the Port Acres Field by an Order of the Texas Railroad Commission dated August 18, 1958, as a result of hearings held in April and May, 1958 (Pl. Ex. 1), and the first proration schedule issued by the Railroad Commission for these field rules was for the month of October, 1958. Pl. Ex. 11; Henderson Ex. 7.

Rule 1 of that order is the spacing rule and provides for the drilling of wells no nearer than 1320 feet to any other

well on the same lease or unit and no nearer than 330 feet to any property line. This rule also provides:

> "The aforementioned distances • • • are minimum distances to allow an operator flexibility in locating a well, and *the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit.*"

Rule 2 of the same Order provides for standard proration units of 160 acres with allowance of additional tolerance acreage up to 10% of the standard unit so that the maximum size unit will not exceed 176 acres.

Rule 3 of the order of August 18, 1958 provides that the daily allowable production for each reservoir of the Port Acres Field will be divided among the wells completed in that reservoir on the basis of ⅓ of the total reservoir allowable being allocated equally among the wells and the other ⅔ divided among the wells in the proportion that the acreage assigned to each well "bears to the sum of the acreage in the reservoir."

Rule 4 of the Order specifies the casing and cement program.

Of these four Rules contained in the Commission's Order of August 18, 1958, only Rule 3, the gas allocation formula and any related provisions of the Order, were complained of by Henderson. No attack was made upon the spacing rule, the rule establishing the size of unit, or the rule establishing the casing and cement requirements.

At the time of the 1958 Railroad Commission hearings there were only six producing wells in the Field (S.F. 828; 1333) and only nine had been completed as of August 18, 1958 the date of the first proration order. Pl. Ex. 31. The first proration schedule issued under that order for October, 1958 shows that these nine wells were located on proration

units ranging in size from 118 acres, the smallest, to 176 acres, the maximum size unit, with the average being 158 acres. Pl. Ex. 11; Henderson Ex. 6. These wells were all located in the thin sand, eastern part of the Field, where there are no town lots or small tracts.[10] S.F. 810; 828-829; Pl. Ex. 28, 41 and 42; Henderson Ex. 51.

There was no tangible evidence at the time of the 1958 hearings that there was going to be a thick sand western portion of the Field in the area of the town lot subdivisions or that the discovery area, by comparison, would be in the thin sand. S.F. 828-829; 837.

Henderson completed its Judice No. 1 Well on October 28, 1958, during the first month of proration (Pl. Ex. 31), and shortly thereafter, *on November 21, 1958, prior to the hearing of any application for permit to drill any of the town lot wells,* Henderson filed its application with the Railroad Commission for an order discontinuing the 1/3 per well, 2/3 acreage, allocation formula, and prorating the Field on some reasonable basis. Pl. Ex. 2.

In January, 1959, the other Respondents herein and Humble Oil and Refining Company joined in the Henderson request for a change in Field Rules. *Thus, all of the then operators in the Field joined in the request for a change in Field Rules prior to the commencement and completion of any Rule 37 Wells.* The hearing on this application was held April 20, 22, 23 and 24, 1959, and was participated in by Petitioners and their attorneys. Pl. Ex. 15. At this time 20 wells had been completed in the Field, *all*

[10] Throughout this Brief we will refer to wells drilled and authorized to be drilled under exceptions to the spacing rule as "small tract wells," "town lot wells," or "Rule 37 Wells." A total of 40 such Rule 37 Wells had been permitted as of the date of trial (Henderson Ex. 52), and as of that date, 20 such wells had been drilled and were on the proration schedule. Henderson Ex. 31. Such Exhibit indicates that the average size unit for the 20 wells was slightly less than one acre.

on units of 118 acres or more, and no town lot wells had been completed. Pl. Ex. 31; Henderson Ex. 13 and 14.

By the time of the April 1959 hearing, it had become apparent that the Field was not to be confined to the large tract units of the original wells (Henderson Ex. 7), all located in the eastern part of the Field as presently known. (S.F. 828; Henderson Ex. 34), but was extending in a westerly direction across various town lot subdivisions in and around the town of Port Acres, Texas. (See Pl. Ex. 19 for these various subdivisions, and Henderson Ex. 34 for a base map of the Field). It had further become apparent that the eastern part of the Field was a thin sand area, and the new western part a thick sand area, and that the tremendous withdrawals from the original wells located in the thin sand, eastern part of the Field had caused a low pressure area to develop, with the western part of the Field registering pressures several hundred pounds greater than the eastern portion. S.F. 805, 810, 828.

Against this background, at the 1959 hearing the Railroad Commission was requested *by all producers* to establish a proration formula based upon relative acre feet of productive sand for the various units as determined by net effective feet of sand in the well bore multiplied by the productive acres assigned to the well. S.F. 227; Pl. Ex. 9, 15, 17.

Although all of the then operators of wells in the Field requested similar relief and no town lot wells were then completed in the Field, the Commission refused to change its $\frac{1}{3}$ per well, $\frac{2}{3}$ acreage, proration formula, and this appeal resulted. Subsequent to the hearing, 30 small tract permits were applied for and granted, and by the time of the trial of the appeal from the Commission's order in the District Court, approximately 22 of the 40 outstanding small tract permits had been drilled. Henderson's Ex. 52; S.F. 126; Pl. Ex. 53; Def. Ex. 17. Of these 22 town lot wells, a total of 19 of them are actually located within the exterior

boundaries of or immediately adjacent to four of Henderson's Units. Henderson Exs. 41-48, incl.

The record shows that at the 1959 Railroad Commission hearing Respondent Michel T. Halbouty made the following offer, prior to the completion of any of Petitioners' small tract wells:

> "To avoid the necessity of town lot or small tract drilling in the Port Acres Field in order to recover the minerals underlying such lot or tract, Michel T. Halbouty is entirely willing to pool and unitize his leases with others, in order to form drilling units conforming to the pattern established by the Railroad Commission of Texas. He accordingly offers and agrees in all instances where he owns leases on acreage and units hereafter formed in the Port Acres Field, to pool and unitize his leases with other leases and acreage in such unit, and to pay and bear his ratable share of the cost of drilling and operating costs. As to units which he may form and drill, he agrees to carry any other owner of less than 5 per cent of the leases or acreage in the unit, and to look solely to the production for the recovery of his well costs and operating expenses." (S.F. 644-645).

Respondent Henderson made the same offer. S.F. 668.

In response, Petitioners did not offer evidence as they could have done but asserted their position to be that the pooling offers were "immaterial to this hearing, wholly immaterial." Pl. Ex. 15, page 465. The same position as to the offers to pool was taken by Petitioners in the District Court when they objected to the materiality of evidence thereof on the ground that "the owners of so-called small tracts have a right as a matter of law to develop their tracts separately, and the offer to pool *on any basis* of acreage or otherwise *is immaterial.*" S.F. 639.

As the Texas Supreme Court states in its opinion, "the basic facts are not substantially in dispute." (Appendix,

p. 11a). Under Petitioners' evidence an average one acre town lot tract has reserves of gas and liquid hydrocarbons having a value of only $50,867 (Def. Ex. 22; S.F. 1204; 1252), yet a well on such a tract under the proration formula in suit will be permitted to produce gas and liquid hydrocarbons having a value of $407,501 (Defs. Ex. 21), resulting in the drainage of $356,634[11] in gas and liquid hydrocarbons from other properties per small tract well. Under Henderson's evidence, the value of the gas and liquids drained from the Henderson properties alone over the remaining life of the field will amount to $13,450,000. S.F. 808; 821-822.

The fact of such drainage caused by the order held invalid by the Texas Supreme Court is not in dispute. In the "Reply Brief for Appellees H. L. Dillon, Jr. et al.," filed in the Texas Supreme Court, Petitioners say:

> "• • • we have of course made it clear that under the 1/3-2/3 formula each of the town lot wells will produce more than the equivalent of the gas and condensate originally in place beneath the tract on which the well is drilled." (Pages 11, 12).

Petitioners then state their position to be that they are entitled to drain the properties of others to the extent necessary to enable them "to pay the cost of drilling and operating, plus a reasonable profit." See full quotation on pages 11 and 12 hereof.

The Supreme Court of Texas found that "each 1-acre lot depends upon drainage for 92.87% of its gas recovery and 90.63% of its condensate recovery." (Appendix, page 12a). Petitioners contended they had a "property right" to exact

[11] Petitioners' witness obtained these values by pricing gas at 12.7¢ per MCF. Henderson's average contract price over the term of its gas sales contract was 17¢ per MCF; If such price is applied to Petitioners' quantities the value of the gas and liquids each such well will drain is approximately $584,000 or approximately $12,848,000 for the 22 town lot wells.

such drainage. The Supreme Court of Texas has held that there is no such property right in Texas and a proration order permitting drainage to such extent is invalid. Nothing else was decided by the Texas Supreme Court. Nothing else is therefore before this Court. Thus, we submit, this case has been decided by the Texas Supreme Court solely on the basis of non-federal grounds. *Cf. Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1956), 206 U.S. 1, 51 L. Ed. 933.

No discussion of any constitutional issues now attempted to be raised by Petitioners is to be found in the opinion of the Texas Supreme Court. No attempt to raise any such constitutional issues were made by Petitioners prior to their Amended Motion for Rehearing. No opinion was rendered by the Texas Supreme Court in its Order dated May 23, 1962, overruling Petitioners' Amended Motions for Rehearing.[12]

RESPONDENT'S REPLY TO PETITIONERS' REASONS FOR ALLOWANCE OF THE WRIT

Under this heading Petitioners attempt to assign four reasons for allowance of the writ. We will reply to these "Reasons" in the order as set out in the Petition:

1. Petitioners say they are entitled to a new trial under the doctrine of *Saunders v. Shaw*, 244 U.S. 317, 61 L. Ed. 1163, because they were deprived of an opportunity to present evidence "on the fairness and validity" of the offers to pool made at the Railroad Commission hearing.

No such issue was before the Court. Such an issue could only have arisen if, instead of refusing to continue the

[12] In *McMillen v. Ferrum Mining Company* (1904), 197 U.S. 343, 49 L. Ed. 784, this Court held that a Federal question first raised by a petition for rehearing in the highest State Court is too late to support the appellate jurisdiction of the Supreme Court of the United States, where the State Court, in denying the petition made no reference to the Federal question.

1/3-2/3 order in effect, the Railroad Commission had (i) granted Henderson's application to cancel the 1/3-2/3 formula, (ii) entered a new proration order which was unsatisfactory to Petitioners, and (iii) ruled that Petitioners would receive no greater allowable than as permitted by such order because, before drilling their wells, they had received but declined to accept, reasonable offers to pool their small tracts with the lands of others into regular sized units. None of these things occurred. The Railroad Commission refused to change its method of proration regardless of the drainage consequences to Henderson or any other regular unit operator: A disposition of the case entirely satisfactory to Petitioners.

Under the laws of Texas, the Texas Railroad Commission is the primary fact finding agency and the Courts are not permitted to pass upon a material issue not first passed upon by the Commission.

As the Court said in *Gulf Land Company* v. *Atlantic Refining Company* (1939), 134 Tex. 59, 131 S.W. 2d 73 (and in numerous other cases):

> "• • • the Commission • • • must be • • • the primary, or original, statutory fact finding agency.
>
> "• • • the law contemplates that the Commission shall be left free to finally determine controverted issues of fact. • • • "

and, after referring to its holding in *Magnolia Petroleum Co.* v. *Railroad Commission*, (1937) 130 Tex. 484, 109 S.W. 2d 967, such Court said:

> "We still adhere to the above holdings. They mean that we will sustain a Commission order if it is correct on any theory of law applicable to the case, and that regardless of whether or not the Commission gives a

correct legal reason for such order, or whether or not it gives any reason at all therefor.

"Such rule, however, cannot mean that the District Court can determine a material controverted fact question which was not passed on at all by the Commission in order to sustain a Commission order."

In *Shell Petroleum Corporation* v. *Railroad Commission*, Tex. Civ. App. (1939), 133 S.W. 2d 194, writ refused, it was held that the Court would not pass upon the right of a tract, considered as a part of a larger tract from which it was subdivided, to a well permit since no such issue was passed upon by the Commission.

In *Humble Oil & Refining Company* v. *Bennett*, Tex. Civ. App. (1941), 149 S.W. 2d 220, the Court held that where it did not apear whether or not the Commission passed on the question of limiting the depth of a drilling permit, such question is for the Commission and not the Courts. The Court said:

"Appellants' relief in this regard would be for the Commission to determine. It does not appear whether their protests in this regard were made before the Commission, nor that the Commission passed upon the question. * * * It not apearing that the Commission passed upon this contention, it is not before us for determination here."

In *Railroad Commission* v. *Wencker* (1943), 140 Tex. 527, 168 S.W. 2d 625, the Supreme Court of Texas said:

"The Railroad Commission is given the power to determine primarily all fact issues, that is, all issues that are not established as a matter of law, and to permit the Courts to pass upon a question not passed on by the Commission would violate such power."

Thus, since the Railroad Commission did not pass upon the validity and effect of the pooling offers, the Texas

Supreme Court could not remand the case to the District Court for it to receive evidence thereon. As the Texas Supreme Court said, "No such problem is before us." It further made clear the basis of its judgment when it summarized the effect of its holding in the next to last paragraph of its opinion as follows:

> "From the foregoing it follows that the ⅓-⅔ proration formula is invalid *in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent.*" (Appendix, p. 22a).

This holding, which has nothing whatever to do with the offers to pool, was urged by Henderson throughout the proceedings in the District Court and in the Texas Supreme Court, and could not have come as any surprise to Petitioners. *Cf. Butler Bros.* v. *McColgan* (1942), 315 U.S. 501, 86 L. Ed. 991, holding that the doctrine of the *Shaw* case does not apply when there is no element of surprise.

See also, *McMillen* v. *Ferrum Mining Co.* (1904), 197 U.S. 343, 49 L. Ed. 784, cited at page 33 hereof; and *American Surety Co.* v. *Baldwin* (1932), 287 U.S. 156, 77 L. Ed. 231, holding that the doctrine of the *Shaw* case does not apply when, as here, the question is first raised by a petition for rehearing of an appeal to the highest court of the State. These cases also stand for the proposition that where the objection to evidence is made on a non-federal ground, as here. (Petitioners merely objected on the ground that the evidence tendered by Respondents was immaterial), it is too late in a Motion for Rehearing to attempt to raise objections on constitutional grounds. As we have heretofore pointed out Petitioners will obtain their new trial upon the new field rule hearing to be held by the Texas Railroad Commission.

2. We are not entirely certain what "Reasons for Allowance of the Writ" are intended to be included under Section 2, beginning on page 14. of the Petition, unless it be Petitioners' continued insistence that the Texas Supreme Court held that the District Court erred in refusing to receive evidence of Henderson's offer to pool its leases with the numerous small tracts of Petitioners located within and adjacent to the exterior boundaries of the Henderson units, and declared the present proration order of the Commission invalid on the ground that Petitioners should have accepted Henderson's offer.

The Court's opinion is susceptible of no such interpretation, and no such holding was required of it.

As is clear from the Court's opinion, it held that Article 6008, Texas Civil Statutes, requires the Texas Railroad Commission to allocate permitted gas production in such manner as will prevent, rather than cause, drainage; that the order in suit did not comply with this requirement and was therefore invalid as to Henderson and other Respondents. It expressly refused to dictate the terms of any future order and left this to be decided by the Texas Railroad Commission after notice and hearing to all interested parties as required by the statute. If any such future order treats both Petitioners and Respondents fairly and justly, as the Court assumes will be the case, then it will remain immaterial whether or not Petitioners were offered a fair and reasonable opportunity to pool their small tracts with the larger tracts of others. On the other hand, if any such future order of the Commission is in any manner predicated on whether or not Petitioners did or did not receive, or do or do not hereafter receive, a reasonable offer to pool, then that issue can be litigated by Petitioners if they are dissatisfied with the Commission's disposition of the case. See Section 8 of Article 6049c, Texas Civil Statutes. Appendix, page 39a.

Nothing this Court said or held in *Thompson* v. *Consolidated Gas Utilities Corp.* (1936) 300 U.S. 55, 81 L. Ed. 510, could possibly aid or comfort the Petitioners' contentions. The quotation from that case, appearing at page 15 of the Petition for Certiorari, carefully omits the immediately preceding sentence, which was:

> "Prior to the enactment of House Bill 266 (an amendment of Article 6008, the Texas gas proration statute), the property rights of the plaintiffs were substantially those conferred by the common law of the State."

Petitioners also choose to omit from their quotation the following portion of the Court's opinion:

> "It may be assumed that House Bill 266 *should be construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas to their justly proportionate shares thereof, free of drainage to neighboring lands.*"

That is precisely the holding of the Texas Supreme Court in the instant case.

As to Petitioners' argument regarding the meaning and effect of Articles 6008b and 6014, relating to pooling, we simply say that these are local, non-federal questions which, contrary to Petitioners' contentions, the Texas Supreme Court did not and had no occasion to decide under the facts of this case and which in any event, this Court will not decide. *Walters* v. *City of St. Louis* (1953), 347 U.S. 231, 98 L. Ed. 660; *United Gas Public Service Co.* v. *Texas* (1937), 303 U.S. 123, 82 L. Ed. 702; *Railroad Comm. of Texas* v. *Pullman Co.* (1940), 312 U.S. 496, 85 L. Ed. 971; *Atlantic C. L. R. Co.* v. *North Carolina Corp. Comm.* (1906), 206 U.S. 1, 51 L. Ed. 933; *Nelson* v. *County of Los Angeles* (1960), 362 U.S. 1, 4 L. Ed. 2d 494, *Clay* v. *Sun Insurance Office, Ltd.* (1960), 363 U.S. 207, 4 L. Ed. 2d 1170; *Scripto,*

Inc. v. *Carson* (1960), 362 U.S. 207, 4 L. Ed. 2d 660. However, the Court will note that paragraph (g) of Article 6014, cited by Petitioners, passed in 1931 (Acts, 42nd Tex. Leg., 1st C.S., 1931, page 46), relates to *oil pools*. Gas proration is governed by Article 6008, Texas Civil Statutes, and pooling authorization by Article 6008b, passed in 1949 (Acts 51st Tex. Leg., 1949, p. 477, Ch. 259). If paragraph (g) of Article 6014 ever applied to gas pools, which we deny, it is superseded by Articles 6008 and 6008b, subsequently enacted.

Petitioners' contention that the statutory authority of the Texas Railroad Commission to prorate gas is not reasonably definite and certain is likewise invalid. In *Corzelius* v. *Harrell* (1944), Tex. Civ. App., 179 S.W. 2d 409, in discussing the Texas gas proration statute the Court quoted with approval the following portion of the Court's opinion in *Henderson* v. *Terrell* (1938), 24 F. Supp. 147, 153:

> "'We think the statute is simply and clearly phrased to give effect to a public policy, and to exercise the police power in respect to matters which the courts of Texas and of the United States uniformly hold it is the right of the state by statute, to control. *This right extends to preventing one person from unduly draining from under the lands of another, oil and gas lying in a common pool equally when the undue drainage is for, for wasteful uses, and when the rule of capture no longer applying, because of lawful statutory limitation, one of the owners, by drawing more than his due proportion of the limited share, is draining the lands of his co-owners.*
>
> "We find nothing unreasonable in the statute,[13] nothing unreasonable in the orders. For all that the statute does, all that the orders do, is to make limitation and

[13] A different statute was under consideration in *Henderson* v. *Terrell*, but the Court held the governing principals to be the same.

> proration effective by putting an end to an existing unreasonable drainage condition, and preventing its continuance in the future. Neither the statute nor the order operates retrospectively, either punitively or reparatively; both operate prospectively. So operating, they merely say to plaintiffs 'you may produce from your wells of the total amount limited in a due proportion with every other well in the field. You may not produce more.'";

and then said:

> "The decision in that case rests, in our opinion, upon sound and well established legal doctrine which controls the issues in the instant case."

Subsequently, in *Atlantic Refining Co.* v. *Railroad Commission of Texas* (1961), .. Tex. ...., 346 S.W. 2d 801, the Texas Supreme Court said:

> "While the Supreme Court granted a writ of error in the Corzelius case and dismissed it as moot in 186 S.W. 2d 931, the opinion of the Supreme Court did not in any way disturb the holding of the Court of Civil Appeals."

3. The Supreme Court of Texas did not hold (as asserted by Petitioners at page 19 of the Petition) that Petitioners drilled their wells at their own risk because they "guessed wrong on whether they should accept offers to unitize or go ahead and develop their tracts separately." The Supreme Court of Texas held that Petitioners drilled their wells at their own risk because of the fact that all of their wells were commenced and completed *pendente lite*; the undisputed evidence being that:

> (i) All except one (it being filed November 10, 1958) of Petitioners' applications for permits to drill their wells were filed with the Railroad Commission (see Henderson Ex. 52) *after* the filing of Henderson's application of November 19, 1958 (Pl. Ex. 2) to the Railroad Commission to set aside the ⅓-⅔ proration for-

mula, and *after* the notice of hearing issued on that application on November 21, 1958 (Pl. Ex. 3);

(ii) All of the hearings held by the Railroad Commission on Petitioners' applications for permits to drill their wells were held *after* the filing of Henderson's application for a change in Field Rules and *after* the issuance of notice of such hearing (Henderson Ex. 52);

(iii) All of Petitioners' wells were completed *after* the hearing held April, 1959, on Henderson's application to set aside the ⅓-⅔ proration formula (See Pl. Exs. 31 and 32); a hearing attended by Petitioners and their attorneys (Pl. Ex. 15).

In fact, of the 22 town lot wells, *20 of them were actually completed* after the filing of the appeal from the Commission order in the District Court on August 14, 1959. Pl. Exs. 31 and 32.

Likewise, the assertion (at page 19 of that Petition) that the Texas Supreme Court "has denied a hearing to Petitioners on the issue of unitization" is not correct. As previously pointed out at page 33 hereof, no such issue was in the case. When and if under some future order[14] of the Texas Railroad Commission. Petitioners are put to the choice of accepting unitization or not, it is manifestly clear that the test to be applied to Petitioners will be the same as that applied in this case to test the validity of the Commission's orders as to these Respondents, viz., Are Petitioners thereby afforded a reasonable opportunity to recover the minerals underlying their land or their equivalant? This is the full extent of their rights under Texas law and the criteria that will be applied to any future order of the Railroad Commission affecting those rights.

[14] For an example of the type of order entered by The Texas Railroad Commission after the Texas Supreme Court's decision in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), ... Tex. ...., 346 S.W. 2d 801, holding invalid a 1/3 - 2/3 proration order for another Field, see p. 26a of the Appendix hereof.

As the Supreme Court of Texas said nearly 30 years ago in *Brown* v. *Humble Oil & Refining Company* (1935), 126 Tex. 296, 83 S.W. 2d 935, 99 A.L.R. 1107:

> "• • • *It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions.*
>
> "• • •
>
> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. Also, conditions may arise where it would be proper, right, and just to permit tracts to be subdivided and such subdivisions drilled after the adoption of the rule; *but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalant in amount to the recoverable oil and gas under his land.* • • •
>
> "The commission, in order to prevent waste, has the power to limit the rate of flow in the same way that it has the power to regulate spacing. See Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403; Danciger Oil & Refining Co. v. Railroad Commission (Tex. Civ. App.) 49 S.W. (2d) 837. This right to control the rate of flow in order to prevent waste also *enables the commission to offset the advantage obtained by one who is given an exception to the spacing rule by limiting his allowable production to the extent necessary to overcome this advantage.* • • • No unreasonable hardships need result, if the rule is faithfully and impartially applied by those authorized by law to administer it."

It is not correct (as Petitioners assert at page 20 of their Petition) that "there was no way whereby Petitioners could get a judicial determination in advance as to whether they were right in deciding to spend millions of dollars in drilling their wells." Petitioners could simply have awaited the outcome of these proceedings then pending.

4. Petitioners' fourth "Reason for Allowance of the Writ" appears to be that having received permits to drill their wells they have a vested right thereunder to an allowable sufficient to "enable them to get back their drilling costs, operating expenses, and * * * a reasonable profit."[15] The Supreme Court of Texas has said their drilling permits gave Peittioners no such rights; it said:

> "It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits."

So it appears that under Texas law Petitioners have no such rights; and as Petitioners agree in their Conclusion (Petition, page 22), they must accept the decision of the Texas Supreme Court "as *final on matters within the state's exclusive control.*" Is this not such a matter? In *Ohio Oil Company* v. *Indiana* (1899), 177 U.S. 190, 44 L. Ed. 729, this Court held that it was incumbent upon a state when it undertook to limit the production of oil and gas to provide protection to all of the owners of rights in a common pool "by securing a just distribution" thereof and "preventing it from being taken by one of the common owners without regard to the enjoyment of the others." Here the

[15] A permit, such as a building permit or well permit, from a municipal or political subdivision, has no relation to whether a profit will be made from the building or well.

State, through its Supreme Court, has exercised judicial power to prevent that which this Court said in *Ohio Oil Company* v. *Indiana* a state must prevent.

The Supreme Court of Texas says the test to be applied is "to each his own." Petitioners say the test to be applied is drainage to recover costs.[16] But such a test could only apply to those operators like Petitioners who have insufficient reserves of their own. An additional test would have to be devised to apply to the operators having more than sufficient reserves to recover their costs to determine how much of the costs of the deficiency operators they must bear, respectively, and how much of the remaining reserves, if any, they would be permitted to produce as compared to other operators similarly situated.

Petitioners have no such vested rights. As the Supreme Court of Texas said in *Gulf Land Company* v. *Atlantic Refining Company* (1939), 134 Tex. 59, 131 S.W. 2d 73:

> "It is the law that every owner or lessee of lands is entitled to a fair chance to recover the oil and gas in or under this land, or their equivalent in kind. Any denial of such fair chance would be 'confiscation'."

Thus, if Petitioners should be permitted to produce more than their limited town lot reserves by drainage from Henderson's properties, as will be the case under the order in suit, it is Henderson whose property would be confiscated; not Petitioners, and this will not be permitted under Texas law.

But as we said before and as this Court has held, these are State, not federal matters, and Petitioners are, as they say, conclusively bound by the Judgment of the Supreme Court of Texas with respect thereto. As this Court said

---

[16] Costs of wells vary widely and give no standard; an example being that one well in this Field cost $197,000, while another cost in excess of $500,000. S. F. 814. Operating costs also vary considerably. S.F. 839, 849.

in *Railroad Commission of Texas* v. *Rowan and Nichols Oil Co.* (1940), 311 U.S. 570, 85 L. Ed. 358:

> "* * *. In any event, a state's interest in the conservation and exploitation of a primary natural resource is not to be achieved through assumption by the federal courts of powers *plainly outside their province and no less plainly beyond their special competence. The Fourteenth Amendment was not intended for such ends.*"

and in *Bell Telephone Co.* v. *Pennsylvania Public Utility Commission* (1939), 309 U.S. 30, 84 L. Ed. 563, this Court said:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

Finally, we refer this Court to its holding in *Southwestern Bell Tel. Co.* v. *Oklahoma* (1937), 303 U.S. 206, 82 L. Ed. 751, wherein it is said:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of the court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

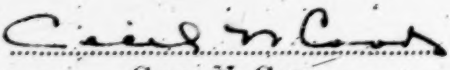
It is submitted that no federal question was presented to or decided by the Texas Supreme Court in this case and that (the Texas Railroad Commission being the only necessary party defendant to the suit) the case would have

been decided precisely the same as it was with or without Petitioners in this suit and with or without the town lot well question (the thin sand versus thick sand question requiring in itself the same result).

CONCLUSION

As we said at the outset, Henderson's damages by the delay incident to Petitioners' appeal are estimated to be on the order of $1,000,000 per year or $2,600.00 per day. On the other hand, as set out at page 7 hereof, Petitioners will gain approximately 200% in their rate of production by having no proration order in effect. We pray that the Court will speedily deny the Petition for Certiorari so that the Texas Railroad Commission may proceed to call another hearing and thereafter promulgate a just and reasonable proration order for all producers in this Field.

Respectfully submitted,



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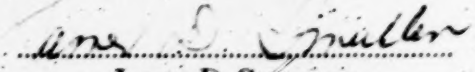

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I, James D. Smullen, an attorney for Respondent Peter Henderson Oil Company, depose and say that I have this day served copies of the foregoing Brief of Respondent Peter Henderson Oil Company in Opposition to the Petition for Writ of Certiorari and the Appendix thereto, by mailing the same by United States Certified Mail, Return Receipt Requested, to the following counsel of record in said cause:

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Subscribed and Sworn to before me on this the 21st day of September, A.D. 1962.

Notary Public in and for
Harris County, Texas

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IN THE
SUPREME COURT OF TEXAS

No. A-8200

MICHEL T. HALBOUTY ET AL., *Appellants*, vs. RAILROAD COMMISSION OF TEXAS ET AL., *Appellees*.	On Direct Appeal from Travis County.

Michel T. Halbouty and others bring this direct appeal from a decree of the trial court upholding certain orders of the Railroad Commission of Texas and denying to the appellants a permanent injunction and all other relief prayed for.

In the trial court the appellants sought to restrain the Railroad Commission from continuing in effect the allocation formula adopted August 18, 1958, for the Port Acres Field in its order #3-38,395 which reads as follows:

> "RULE 3. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the following manner:
>
> "(a) Two-thirds (⅔) of the allowed gas production from a non-associated gas reservoir shall be allocated to the individual wells completed therein in that proportion that the acreage assigned to each such well bears to the sum of the acreage in the reservoir.
>
> "(b) One-third (⅓) of the allowed gas production from a non-associated gas reservoir shall be

allocated equally among the individual wells completed therein.

"(c) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowables."

They also prayed that the Commission be further enjoined from allowing the marketing of gas from the Port Acres Field until the Commission required the operators in the field to maintain the pressure at such point as would permit the maximum recovery of hydrocarbons contained in the reservoir and to prevent unnecessary waste of those natural resources.

The trial court sustained exceptions to the pleadings in so far as they were directed to the refusal of the Railroad Commission to enter the compulsory cycling and pressure maintenance order and found and concluded that the order of the Commission otherwise complained of was reasonably sustained by substantial evidence and is lawful and valid.

At the outset the Railroad Commission and the other appellees vigorously challenge our jurisdiction of this direct appeal on the ground that such appeal will lie only where the purpose of the suit is to restrain action or threatened action on the part of the Commission and not when the object of the suit is to compel action. In other words they say that the real purpose and object of this suit is to compel the Railroad Commission to enter a new proration order and to order cycling and pressure maintenance in the Port Acres Field.

To support their position in this respect they rely on our decision in Boston v. Garrison, 152 Tex. 253, 256 S.W. 2d 67. That suit as first filed sought to restrain the officials of the Department of Public Safety from suspending a chauffeur's license. Prior to the trial the license had expired and plaintiff, by an amendment to his petition, sought

to compel the department to renew the old or issue a new license. We held that a direct appeal would not lie in that respect and that his only redress was in the nature of a mandamus. We did not hold that we would not have jurisdiction of the appeal from the refusal of the trial court to restrain the department from suspending the license but that matter had become moot.

In the case here the appellants assert that the proration formula of one-third and two-thirds is unjustified, unreasonable and invalid and of that issue we do have jurisdiction. Incidentally, a striking down of this proration order would, in the natural course of things, enjoin upon the Railroad Commission the duty to write a new order, but it is not within the scope of our jurisdiction here to direct the Commission in that regard. What we have before us is the validity vel non of the order as written. Railroad Commission v. Sterling Oil & Refining Co., 147 Tex. 547, 218 S.W. 2d 415; Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W. 2d 369; Texas & N. O. Ry. Co. v. Railroad Commission, 155 Tex. 323, 286 S.W. 2d 112; Railroad Commission v. Shell Oil Co., 146 Tex. 286, 206 S.W. 2d 235.

Article 1738a, Vernon's Ann. Civ. Stat., reads in part as follows:

> "* * * appeals may be taken direct to the Supreme Court of this State from any order of any trial court granting or denying an interlocutory or permanent injunction * * * on the ground of the validity or invalidity of any administrative order issued by any State Board or Commission under any statute of this State. * * * *"

The article further provides that the Supreme Court shall prescribe the necessary procedural rules to be followed in perfecting such appeal. Pursuant to that directive, Rule 499-a was adopted.

In Atlantic Refining Co. v. Railroad Commission of Texas, ... Tex. ..., 346 S.W. 2d 801, our jurisdiction of the direct appeal was attacked and while we did not there discuss the question of jurisdiction that decision by implication holds contrary to appellees' contention.

"In so far as appellants complain of the refusal of the Railroad Commission to require compulsory cycling and pressure maintenance in this field is concerned, we do not have jurisdiction of the appeal. The jurisdiction of the Supreme Court on direct appeal is dependent upon and limited to the wording of the Constitutional Amendment, Art. 5, § 3b, and Art. 1738a, Vernon's Ann. Civ. Stat. While in the trial court appellants prayed for an injunction to restrain the Commission "from approving or allowing the withdrawals of gas to market from the Port Acres Field in such quantity and under such conditions as will result in the preventable waste of the hydrocarbon content of such gas until such time as the Commission has duly entered an order or orders requiring the operators in such field to maintain the pressure in the field at a point which will permit the maximum recovery of the hydrocarbons contained in the reservoir to the end that preventable waste of such natural resources shall be prevented," nevertheless the actual relief sought was to require the Commission to enter a compulsory cycling and pressure maintenance order. It was so considered and treated by the Commission.

These proceedings were instituted before the Commission in the following manner: On November 19th, three months after the adoption of Special Order No. 3-38,395, Peter Henderson Oil Company requested that the Commission hold a hearing to reconsider and amend Rule 3 thereof. Notice was given that the hearing was set for January 27, 1959. On January 22nd Halbouty and Meredith joined in the Henderson Company request and asked that the issues

be broadened to include the question of whether recycling or other secondary recovery operations should be instituted and conducted. On January 23rd Pan American joined in the Halbouty-Meredith request. On July 6, 1959, after hearing and consideration, the Commission notified all parties of its action as follows:

> "This is to advise that the Commission, at a formal conference held July 6, 1959, denied your application for a mandatory cycling order for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas.
>
> "The Commission further denied your application for an allocation formula based on net acre feet for the subject field and ruled that the allocation formula based on ⅔ acreage and ⅓ per well shall continue to remain in effect."

In Boston v. Garrison et al., supra, under the direct appeal provision it was pointed out that the Supreme Court does not have jurisdiction where the purpose of the suit is to require or to compel action although the relator prayed "that mandatory injunction shall issue requiring the defendants to issue plaintiff renewal license or provisional license." That in effect was an application for mandamus to compel the department to issue the license.

In Lane v. Ross, 151 Tex. 268, 249 S.W. 2d 591, the relators prayed that the respondent be ordered and commanded not to transmit to the chairman of a state political committee certain minutes and returns of election and that the respondent be ordered to transmit certain other minutes and returns. We held that in this original action this court did have jurisdiction to issue a writ of mandamus but no jurisdiction to grant injunctive relief and since there appeared to be no need for issuance of the mandamus the petition was dismissed.

In Boston v. Garrison we said:

"• • • In that case [Lane v. Ross] there was jurisdiction to issue the writ of mandamus but no jurisdiction to issue a writ of injunction, and because of the want of jurisdiction the injunctive relief was denied. Here, assuming that constitutionality or validity is properly involved, the court has jurisdiction on direct appeal from an order or judgment granting or denying an injunction, but no jurisdiction on direct appeal from an order or judgment granting or denying mandamus."

So here an application to restrain the Commission from allowing gas to be marketed until the Commission has entered an order requiring recycling of gas is the equivalent of an application to have the court compel the Commission to enter the recycling order. The appeal to the district court lay from two separate and distinct and severable orders of the Commission. A combination of the two complaints in one cause would not serve to give us jurisdiction where otherwise it would not attach.

It appears that the Port Acres Field produces only gas and condensate. It embraces an area of approximately 3,000 acres. The discovery well was completed in 1957. The production is from sands at a depth of something over 10,000 feet. The Commission, in its special order for this field adopted the following spacing rule:

"Rule 1. No gas well shall hereafter be drilled nearer than thirteen hundred and twenty (1320) feet to any well completed in or drilling to the same reservoir on the same lease, unitized tract or farm, and no well shall be drilled nearer than three hundred and thirty (330) feet to any property line, lease line or subdivision line; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property grant exceptions to permit drilling within shorter distances than herein prescribed whenever the Commission shall have determined that such exceptions are necessary either to prevent waste or to prevent the con-

fiscation of property. When exception to this rule is desired, application therefor shall be filed and will be acted upon in accordance with the provisions of Commission Statewide Rules 37 and 38, which applicable provisions of said rules are incorporated herein by reference.

"The aforementioned distances in the above rule are minimum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit."

Thus the Commission determined that one well to 160 acres would effectively recover all of the hydrocarbons contained in the field reservoir.

At the time of the trial there were said to be 25 producing wells on large units or tracts and 22 producing wells drilled under permits issued as exceptions to Rule 37.

This suit was brought by Pan American Petroleum Corporation, Michel Halbouty and Meredith and Company. Peter Henderson Oil Company intervened and these four are appellants. A number of the small tract owners intervened and aligned themselves with the Commission. They are H. L. Dillon, Jr., H. C. Barnes, Tyrell-Combest Realty Company and P. G. Lake, Inc. Most of the small tract owners in this field have entered into unitization agreements. For instance, the Peter Henderson Oil Company units, three in number, consist of several hundred small tracts. The 22 Rule 37 wells are situated on tracts ranging from 2/10ths of an acre up to 5 acres; 16 embraced less than one acre and 10 less than one-half acre.

The principal contention urged by the appellants is to the effect that the proration formula in this field allocating production on a basis of one-third per well and two-

thirds on the amount of acreage in the tract is not reasonably sustained by substantial evidence, but on the other hand is arbitrary, unreasonable and confiscatory of appellants' property. Under the record before us we are of the opinion that this case is controlled by our recent decision in Atlantic Refining Co. v. Railroad Commission, ... Tex. ....., 346 S.W. 2d 801 (hereinafter referred to as Normanna) and the point is therefore sustained.

The Attorney General in his brief for the Railroad Commission squarely points up the real issue before us that goes to the heart of this case. He says "that townsite operators do have a property right in the reserves underlying the large tract owners, and that that right extends to the right to drain enough oil or gas from other tracts in the field to yield a reasonable opportunity for a profit to the operator." The other appellees also assert that right.

In other words, since the owner of a tract, no matter how small, is entitled to one well to prevent the confiscation of the gas underlying his tract, he, therefore, becomes entitled to confiscate gas from adjacent properties sufficient to pay the cost of his drilling operations and return a reasonable profit. In support of that proposition he cites only Railroad Commission v. Humble Oil & Refining Co., Tex. Civ. App., 193 S.W. 2d 824, wr. ref. n.r.e., [the Hawkins case] where the following statement is to be found:

> "As a corollary to these rules, it is held that the owner of an 'involuntary' segregated tract cannot be denied the right to drill at least one well on his tract however small it may be. From which it would seem that his allowable can not be cut down to the point where his well would no longer produce, (See Railroad Commission v. Mackhank, Tex. Sup., 190 S.W. 2d 802) nor below the point where it could not be drilled and operated at a reasonable profit." (No authority is cited in support of the latter conclusion).

In the Mackhank case the only proposition decided by this court was that there was substantial evidence reasonably supporting the conclusion that in order to prevent waste it was necessary to keep the two wells on production and the order was therefore not invalid. The Mackhank decision can in no way be construed as authority for a rule that would require allowable production sufficient to return the cost of the well and its operation plus a reasonable profit. The conservation statutes nowhere suggest such a factor. We find nothing in the law to justify that proposition.

In the Hawkins case the testimony was that Humble's properties contained 76.5 per cent of the recoverable reserves of the entire field and under the effective proration order it was allowed to produce only 71.4 per cent and this, if continued for the estimated life of the field, some 27 years, would result in drainage from the Humble's properties to the Townsite section of some thirty million barrels of Humble's oil. Some witnesses, on the other hand, testified that the productive life of the Townsite 73.74 acres would be shortened below that of the remainder of the field by some ten years on account of its position on the structure and the heavy withdrawals. Another witness testified that in his opinion if production were unrestricted the town lot wells would produce more oil than under the proration order then in effect. The court pointed out other considerations and factors which served to support the reasonableness of the Commission's order.

The Hawkins case goes further to state the accepted rule which is contradictory of any theory that the allowable must be fixed on a cost plus profit basis, namely, "In the exercise of this rule of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations afford the several prop-

erty owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent." This rule had theretofore been firmly established in our jurisdiction.

In Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73 (1939), we held:

> "• • • It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S.W. 2d 1240, writ refused. • • •"

Again in Trapp v. Atlantic Refiining Co., Tex. Civ. App., 169 S.W. 2d 797, wr. ref., it is said:

> "• • • The uniform holding has been that the criterion implicit in this exception is whether the well is necessary to protect the owner in his right to obtain his fair share (or the equivalent thereof) of the recoverable oil underlying his land. Both of these exceptions were discussed and upheld in Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73. Since the issue raised in this contention has been so conclusively adjudicated, its discussion as an original proposition is both unnecessary and undesirable."

The Legislature announced a declaration of policy in the production and use of natural gas in § 1, Art. 6008 as follows:

> "In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."

In Corzelius v. Harrell, 143 Tex. 508, 186 S.W. 2d 961, we quoted with approval the language used by the United States Supreme Court in Thompson v. Consolidated Gas Corporation, 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510:

> "* * * It may be assumed that House Bill 266 [Art. 6008] should be construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas to their justly proportionate shares thereof, free of drainage to neighboring lands. * * *"

In Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W. 2d 941, we held that "Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns; and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation."

As pointed out in Normanna we also held in the Marrs case that the allowables fixed for the two separate areas were entirely out of proportion to the potentials and would result in the taking of one man's property and giving it to another. Although the Marrs case rejected the substantial evidence rule, nevertheless that is not to say that the rules of law otherwise announced by that decision are wrong or have been overruled by later decisions of this court.

In the case presently before us the basic facts are not substantially in dispute. The contentions arise over conclusions to be drawn from those facts. From the testimony of Dillon's witness, the only witness offered by any of the appellees, it appears that a 1-acre tract under the $\frac{1}{3}$-$\frac{2}{3}$ formula would have a total gross income from April 1, 1960,

to the end of its productive period of $407,501.00. The total cost of such a well, including drilling, operating, and royalty expenses, would be $361,674.00, leaving a net profit of $45,827.00. The same testimony shows that under a formula based on acre feet of producing sand, each 1-acre tract even without prior production would have only a total gross income of $50,867.00. This witness further testified that the total hydrocarbon recovery from each 1-acre tract under the 1/3-2/3 formula would be 1,542,987 MCF of gas and 69,358 barrels of condensate. That of this total recovery, 1,432,987 MCF of gas and 62,858 barrels of condensate would be contributed by drainage. In other words, each 1-acre lot depends upon drainage for 92.87% of its gas recovery and 90.63% of its condensate recovery.

The witness further testified that the estimated field capability is 165,932,900 MCF of gas and 7,458,732 barrels of condensate; that the 22 small tract wells combined would recover 33,945,714 MCF of gas and 1,525,876 barrels of condensate. This witness estimates a total of 116,063 acre feet of producing sand in the Port Acres Field and he assigns 2,050 acre feet of this total or 1.77% to the 22 Rule 37 tracts. According to his figures, these small tracts with 1.77% of the producing sand would under the 1/3-2/3 formula recover 20.46% of the field's total gas and condensate potential.

Petitioner's exhibit from the Railroad Commission allowable schedule for September, 1960, shows 20 Rule 37 wells with a total allowable of 193,599 MCF of gas. Twenty-five wells on normal 160-acre proration units (some being less than 160 acres) are allowed to produce 1,116,416 MCF of gas. The tracts on which the 20 Rule 37 wells are situated comprise only 19.89 acres, while the 25 regular wells are located on 3,036 acres. Thus, on a productive acre basis, the 20 wells having .65% of the total acreage receive 14.6% of the allowable.

By way of comparison between the well on one of the largest producing units and the well on one of the smallest units, the following table is constructed from the testimony of the appellees' witness:

Surface Acreage		Monthly Allowable (MCF)	Average
Pan American-Ward	176.00	48,587	276.06 MCF per acre
Thompson-Sassine	.25	9,515	38,060.00 MCF per acre
Acre Feet of Sand			
Pan American-Ward	9,851.9	48,587	4.932 MCF per acre foot
Thompson-Sassine	17.8	9,515	534.551 MCF per acre foot

Thus, on the basis of the present proration order the well on the one-fourth acre tract is allowed to produce 137 times as much gas per acre as the well on 176 acres and 107 times more per acre foot of producing sand.

Article 6008, § 12, Vernon's Ann. Civ. Stat., provides that the Commission shall proceed to regulate and prorate gas production in the reservoir "on a reasonable basis". The Article further provides that "the monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste." Section 12 of that statute provides that the Commission shall take into account in fixing the daily allowable production for each gas well the size of the tract, the relation between the daily producing capacity and the aggregate daily capacity of all gas wells and all other factors which are pertinent.

The appellees offered some testimony that there is potentially a water drive from the east to the west that would result in longer and greater production in the western portion of the field where the Rule 37 wells are located, the theory being that this water drive would limit and flood out

the eastern wells forcing the gas westward into the higher structure where the Henderson Rule 37 wells are located, thus compensating Henderson at least in part for the drainage loss. On the other hand the appellants' witnesses emphatically assert that there is presently no water drive and deny that there is any indication of such occurrence in the future. We understand from the testimony that no water drive has yet occurred that has resulted in any loss to or flooding of the wells to the east where the drive would first be felt. Admittedly these Rule 37 wells are located in the area where the producing sand stratum is thicker and the structure is higher. In our opinion neither of these factors offer any comfort to the Rule 37 appellees because their tracts are almost completely surrounded by and lie within the confines of the Peter Henderson oil units and will necessarily drain from those units. There is testimony in the record that Halbouty and Meredith under the ⅓-⅔ formula will eventually produce substantially all of the gas estimated to underlie their land, but this fact does not tend to make the formula a reasonable one as between the Rule 37 wells and Henderson.

In making a comparison between the Peter Henderson units and the 20 Rule 37 wells[1] we use the testimony of appellees' witness. The Henderson units comprise 520.3 acres or 19.84% of the total field acreage and have 16.13% of the total field allowable while the 20 Rule 37 wells have a total of 19.88 acres or .76% of the total acreage and receive 14.78% of the total allowable.

From the testimony of the same witness it appears that Peter Henderson has 33,807 acre feet or 29.37% of the total acre feet in the field, while the 20 Rule 37 wells have only 1,957 or 1.70% of the total.

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[1] Only wells on October, 1960, Proration Schedule are used.

The appellees urge that this case is distinguishable from Normanna on the facts and therefore the latter should not control. (1) They say the Normanna Field had not been substantially developed, whereas the Port Acres Field is well developed. While this is true, that fact would appear to militate in favor of the appellants rather than of the appellees because the greater the development and the more accurate the obtainable geological information, the less justification can be found for applying the standard ½-⅔ proration formula. (2) They maintain that the allocation formula here is beneficial to some of the large tract producers and does not deprive them of any property rights. Although there is evidence that some of these producers, due to early production, or for other reasons, may recover 100% or more of their reserves in place, it is clear, however, that at least one of them, Henderson Oil Company, whose large units are composed of unitized small tracts, will suffer loss from drainage to the Rule 37 wells. (3) They say as contrasted with Normanna this is not solely a case of large tracts against small ones because Henderson makes the contention that the formula is inequitable as among the large tracts. We fail to see how this would make a material distinction, although the case here is principally one of small tracts that have been unitized against small tracts whose owners have preferred not to unitize. In Normanna we were concerned with only one small tract. Here 40 permits have been granted to drill small tracts of which there are 500 in the field, presenting a much more serious problem so far as orderly economical development is concerned.

Another point of distinction urged is that in Normanna the attack was made against the ½-⅔ formula while in this case the appellants asked the Commission to enter their "recommended order" in lieu of the ½-⅔ proration order. In other words they say that by the terms of appellants' ap-

plication the Commission was limited to an acceptance or rejection of the recommended order in that the appellants asked for no other relief than on a "take it or leave it" basis. They argue that there is a great difference procedurally between an application to enter a specific order and one claiming that the rule in effect is unduly harmful and requesting the Commission to rescind that rule and enter one that is fair and in its stead.

We do not so construe the proceedings in this case nor evidently did the Commission. Henderson's application reads: "On behalf of Peter Henderson Oil Company we wish to request a hearing to reconsider and amend Rule 3 of the special order adopting rules and regulations for the Port Acres [Lower Hackberry] Field of Jefferson County, Texas." At the time of filing of Henderson's application, November 19, 1958, only one permit to drill in this field as an exception to Rule 37 had been requested and it was not granted until December 22, 1958. The notice of the hearing issued by the Commission recited that the hearing would be held for the purpose of considering the application of Peter Henderson Oil Company and concluded as follows: "Pursuant to said Hearing the Commission will enter such rules, regulations, and orders as in its judgment the evidence presented may justify."

In Henderson's motion to the Commission for rehearing it is argued that the present formula is unjust and untair and does not allow to all parties a fair opportunity to have and produce their fair share of the gas and condensate from the reservoir. In that connection the motion urges the Commission to take into consideration the variation of the sand thickness, the size of the tracts, the drainage from the thick sand portion of the field into the thin sand and all other pertinent factors shown by the evidence to exist. It is also argued that if the per well factor is retained it should be substantially less than one-third.

The proceedings before the Railroad Commission are informal and their validity will not be tested by the technical rules of pleadings and practice that obtain in court trials. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W. 2d 967; Cook Drilling Co. v. Gulf Oil Corporation, 139 Tex. 80, 161 S.W. 2d 1035.

The fact that appellants suggested and urged upon the Commission that the proration formula should limit recovery substantially to the reserves in place beneath each tract does not foreclose their right to complain of the formula which they considered inequitable and confiscatory of their property nor does it limit the Commission solely to the option of either accepting or rejecting the proposed formula in toto. All parties, of course, concede that the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated.

The appellees, in seeking to uphold the proration formula adopted by the Commission, discuss at considerable length the so-called "rule of capture" and claim some benefit or protection under that rule. They cite among other cases Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, 87 S.W. 2d 1069; Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961; Ryan Consolidated Petroleum Corporation v. Pickens, 155 Tex. 221, 285 S.W. 2d 201. The doctrine of these cases is stated in Corzelius as follows:

> "The rule in this State recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. It is also held that such rule should be considered in connection with the law of capture, which is recognized as a property right and both rules are subject to regulation under the police power of this State."

Somewhat more positively we said in Eliff v. Texon Drilling Company (1948), 146 Tex. 575, 210 S.W. 2d 558, 44 A.L.R. 2d 191,[2] that:

> "In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations."

In Ryan v. Pickens it is stated that "The courts of Texas have consistently held that the rule of capture is still in force in this State. It has become a vested property right." That is not to say, however, that the rule of capture is unlimited or not modified by the accompanying rule recognized by all the cases and stated in the Ryan case as follows:

> "* * * Here [in Texas] oil and gas in place are by the established rules of property a part of the realty or corpus of the land, and subject to ownership, severance, conveyance, lease and taxation as such. * * *."

The very fact that the Commission has the right to limit production on the basis of acreage is a recognition of that principle. If the Commission has the legal right, which they formerly exercised, to fix a proration formula based one-half per well and one-half on the amount of acreage, and as now generally practiced of basing the allowable 1/3 on the well and 2/3 on the acreage, then there is nothing in the rule of capture that would make it illegal for the

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[2] See also cases cited:

Lemar v. Garner, 121 Tex. 502, 50 S.W. 2d 769; Humphreys-Mexia Co. v. Gannon, 113 Tex. 247, 254 S.W. 296, 29 A.L.R. 607; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W. 2d 27; Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F, 989.

Commission in the exercise of its sound judgment and discretion now to give greater or less weight to the well or acreage factors or for that matter to the amount of reserves in place of any other field factors as provided by the statute.

It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land.

As to the right of capture, appellees refer to the following statement in Brown v. Humble Oil & Refining Co., 126 Tex. 297, 83 S.W. 2d 935, 87 S.W. 2d 1096:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture. The following decisions discuss the law of capture as applied in this State: Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; H. & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 66 L.R.A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; Prairie Oil & Gas Co. v. State (Tex. Com. App.) 231 S.W. 1088, 1089. Both rules are subject to regulation under the police power of a state."

The court seems here to be merely stating what the rule of capture is if unlimited by correlative rights, for in the preceding paragraph the court expressly reaffirms that in Texas the law recognizes the ownership of oil and gas in place and gives to the lessee a determinable fee therein.

To infer that the rule of capture gives to the landowner the legally protected right to capture the oil and gas underlying his neighbor's tract is entirely inconsistent with the ownership theory. To harmonize both rules, the rule of capture can mean little more than that due to their fugitive nature, the hydrocarbons when captured belong to the owner of the well to which they flowed, irrespective of where they may have been in place originally, without liability to his neighbor for drainage. That is to say that since the gas in a continuous reservoir will flow to a point of low pressure the landowner is not restricted to the particular gas that may underlie his property originally but is the owner of all that which he may legally recover. This seems to be substantially the view expressed in Brown v. Humble, supra.

In Stephens v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566, it was determined that the rule of capture does not conflict with the view of absolute ownership of the minerals in place and we quote: "If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative rights to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own." In the Port Acres Field under the application of the existing proration formula Henderson does not enjoy any correlative rights so far as the small tract wells are concerned since there can be no compensatory drainage to Henderson from the small tracts.

In Normanna the evidence shows that the ⅓-⅔ formula would result in the drainage of a tremendous quantity of gas and condensate from other leases in the field to the 3-acre lease in question, though the precise amount of drainage was incapable of ascertainment, and of course such drainage could not be compensated by drainage from the

.3-acre tract to other leases in the field. The evidence further showed that the order would allow the well on the .3-acre tract to produce at a rate of over 200 times as much gas per acre as a well on the 320-acre unit established by the spacing pattern. We think the evidence here is comparable to that in Normanna. Under the order adopted in the Port Acres Field more than 90% of the hydrocarbons recovered by the Rule 37 wells would be drained from other leases in the field. As said in Normanna the proration formula adopted here of 1/3-2/3 does not come close to compelling ratable production nor afford to each producer in the field an opportunity to produce his fair share of gas from the reservoir.

We fully appreciate the thorny problem that the Commission has in this matter of proration among the hundreds of fields under their supervision with different characteristics and the diverse conflicting interests, views and opinions, but we are confident that with the trained personnel at their disposal a much nearer approximation can be made, giving to all parties an opportunity to produce a fair share of the minerals underlying the field with ratable allowables that will be more nearly equitable than appears in the case before us. As long ago as 1935 we said in the Brown v. Humble Oil & Refining Company case:

> "* * * It is now, however, recognized that when an oil field has has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions."

So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial

loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. While the statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Railroad Commission, Art. 6008b, V.A.C.S. It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits. This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us.

From the foregoing it follows that the ⅓-⅔ proration formula as applied by the Commission in the Port Acres Field is invalid in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent. We hold that it is not reasonably supported by substantial evidence.

The judgment of the trial court is reversed and judgment rendered for appellants.

Opinion delivered:

February 14, 1962

STATEWIDE RULE 25 OF THE RAILROAD COMMISSION OF TEXAS

"RULE 25. PRODUCTION OF GAS TO BE RESTRAINED TO TWENTY-FIVE PER CENT OF POTENTIAL CAPACITY. — When the gas from any well is being used, the flow or production thereof shall be restrained to twenty-five per cent (25%) of the potential capacity of the same; that is to say, in any day (24 hours) the well shall not be permitted to flow or produce more than one-quarter of the potential capacity thereof as shown by the determination of potential provided for in Rule 24 hereof; provided, that this rule shall not apply to casinghead gas, and provided further, that in cases of emergency, greater production may be used after special authority therefor has been secured from the Railroad Commission of Texas. Applications for exceptions to this rule must be made to the Railroad Commission within thirty (30) days after effective date of this order. • • •"

RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION

OIL AND GAS DOCKET NO. 128
#3-48,488

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE PORT ACRES (LOWER HACKBERRY) FIELD, IN JEFFERSON COUNTY, TEXAS

Austin, Texas
May 24, 1962

NOTICE OF HEARING[3]

ON APPLICATION OF PETER HENDERSON OIL COMPANY & PAN AMERICAN PETROLEUM CORPORATION FOR ADOPTION OF A NEW ALLOCATION RULE FOR THE PORT ACRES (LOWER HACKBERRY) FIELD AND DETERMINATION OF THE PRODUCTIVE ACREAGE ASSIGNABLE TO WELLS IN THIS FIELD
JEFFERSON COUNTY, TEXAS

NOTICE IS HEREBY GIVEN To the public and all interested persons that the Railroad Commission of Texas will hold a Hearing at nine a.m., JUNE 18, 1962, in its Hearing Room in the Tribune Building, Austin, Texas, to consider the applications of Peter Henderson Oil Company and Pan American Petroleum Corporation for the adoption

[3] This notice of hearing was cancelled after the Commission was informed that the Texas Supreme Court had stayed the issuance of its mandate and execution and enforcement of its Judgment for a period of ninety days from May 23, 1962.

of a new allocation rule for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas, to replace the rule invalidated by the Supreme Court of Texas in Michel T. Halbouty Et Al Versus the Railroad Commission of Texas Et Al; and for the further purpose of determining productive acreage and other matters related to the allocation of production to the several wells completed in this field.

PURSUANT To said Hearing, the Commission will enter such rules, regulations, and orders as in its judgment the evidence presented may justify.

RAILROAD COMMISSION
OF TEXAS

/s/ W. J. Murray, Jr.
Chairman

/s/ Ben Ramsey
Commissioner

/s/ Ernest O. Thompson
Commissioner

SEAL

ATTEST:

/s/ O. D. Henderson
Secretary

RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION

OIL AND GAS DOCKET NO. 129
#2-46,673

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE NORMANNA FIELDS, BEE COUNTY, TEXAS

Austin, Texas
September 27, 1961

SPECIAL ORDER
ADOPTING RULES AND REGULATIONS FOR THE NORMANNA FIELDS, BEE COUNTY, TEXAS

WHEREAS, Pursuant to the decision of the Supreme Court of Texas in Atlantic Refining Company vs Railroad Commission of Texas, 364 SW 2d 901 wherein the Special Field Rules adopted for the Normanna Fields in SO#2-36,482 as amended in SO #2-37,856 and SO#2-38,217 were ruled invalid, the Commission, after due notice to the public, all interested parties held a hearing on August 14, 1961, for the purpose of adopting special field rules to assure orderly development and production operation in such fields; and

WHEREAS, From its study of the mentioned decision, from the evidence, testimony, and argument adduced at said hearing, and from briefs filed by the interested parties, the Commission concludes it is recognized and understood by all parties that only Rule 3, the allocation rule, was subject to change, that the remaining rules were not questioned, but were considered reasonably necessary to proper regu-

lation of the field, and were acceptable in their present form; and

WHEREAS, The Supreme Court in holding such allocation formula invalid stated;

> "It does not come close to compelling ratable production; neither does it offer each producer in the field an opportunity to produce his fair share of the gas from the reservoir."

and then further stated;

> "The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property;" and

WHEREAS, From a study of the full record adduced at said hearing, which included technical reservoir data and legal briefs submitted by the several interested parties, the Commission is of the opinion and finds that an acreage allocation formula would reasonably provide each party an opportunity to produce its fair share of the gas in a reservoir, but because of the additional responsibility placed upon the Commission, that is, to arrive at a means of preventing confiscation of a small tract's reserves while allowing each operator to produce its fair share of the gas in a reservoir, as knotty a problem as has ever been placed before the Commission, must be solved, that such solution in all probability is best resolved through the use of a special allowable that would encourage a small tract owner to negotiate with his neighbors for fair and just treatment, but would also provide a sufficient allowable to such small tract to encourage a reasonable attitude in such neighbors so that they would endeavor to work out this common problem; and

WHEREAS, The Commission is of the opinion that Rule 3 as adopted herein, provides the impetus for such common endeavor, and as such, within reasonable limits, complies with the thoughts expressed in the Supreme Court decision.

NOW, THEREFORE, IT IS ORDERED By the Railroad Commission of Texas

• • •

IT IS FURTHER ORDERED By the Railroad Commission of Texas that effective October 1, 1961, the following rules in addition to such of the Commission's general rules and regulations as are not in conflict herewith be and the same are hereby adopted to govern the drilling, completion and operation of wells in the above-mentioned Normanna Fields, Bee County, Texas, as such fields are heretofore designated in this order.

RULE 1. • • •

The aforementioned distances in the above rule are minimum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each three hundred twenty (320) acre proration unit.

• • •

RULE 2. The acreage assigned an individual non-associated gas well for the purpose of allocating allowable gas production thereto shall be known as a gas proration unit, and such acreage may be claimed for each non-associated gas reservoir independently of any other reservoir.

No gas proration unit shall contain more than three hundred twenty (320) acres except as hereinafter provided; • • •

RULE 3a. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the proportion that the acreage assigned such well for proration purposes bears to the summation of the acreage with respect to all proratable wells producing from the same reservoir.

RULE 3b. Any Operator having the right to drill a gas well upon a tract containing less than 100 acres, after application, notice and hearing prior to the drilling of the well, may, if in the judgment of the Commission the facts so justify, be given a definite and fixed special allowable, provided the well is completed as a producing well, higher than the allowable that would be fixed for any well completed upon such tract by reference to said allocation formula upon proof to the Commission (1) that the drilling and completion of a well upon said tract is not economically feasible; and (2) that each and every owner of the right to drill upon acreage immediately adjacent to said tract of less than 100 acres has refused to allow the pooling of said tract with enough of said immediately adjacent acreage to create a drilling unit of at least 100 acres upon fair and reasonable terms, that is, upon such terms as would allow the owners to drill, complete and operate the well to be drilled thereon and as would provide that all income received from 7/8ths of the production from said well and all expense of drilling, completing and operating said well should be shared among the owners of the working interest in said drillsite unit upon an acreage basis. Such special allowable shall control the production of gas from said well during its producing life, except that said allowable shall

be related properly to total field production as the same may fluctuate and said special allowable, if granted, shall in no event exceed the allowable of a gas well completed on a tract containing 100 productive acres; provided further however, that any well drilled before the adoption of this rule will be treated, for purposes of this rule, as though it had not yet been drilled.

RULE 4. • • •

RULE 5. • • •

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary.

RAILROAD COMMISSION
OF TEXAS

/s/ W. J. MURRAY, JR.
Chairman

.....
Commissioner

/s/ ERNEST O. THOMPSON
Commissioner

SEAL

ATTEST:

/s/ O. D. HENDERSON
Secretary

/pw

EXCERPTS FROM CERTAIN STATUTES OF TEXAS

Article 6008.

"Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"• • •

"Sec. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:

"• • •

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

"• • •

"Sec. 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purposes of this Article, including rules, regulations, or orders for the following purposes:

"• • •

"(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

"• • •

"Sec. 8. It shall be the duty of all persons, companies or corporations producing natural gas from any gas well to ascertain and determine during the months of January, and July, respectively, of each year hereafter, through appropriate tests, to be made in the presence of and under the supervision of a representative of the Commission, and under uniform and generally recognized methods, and under regulations which shall be prescribed by the Commission, the open flow and rock pressure of each gas well from which natural gas shall be produced, and verified reports thereof shall be filed with the Commission on or before the tenth day of each of the months aforesaid; which said reports shall be kept on file with the Commission and shall become a permanent public record and shall be open to the inspection and examination of the public, and which said reports shall disclose the name of the representative of the Commission who was actually present when such tests were made. If any person producing gas from the same common reservoir be dissatisfied with the test as made and reported, such person may demand a second test to be made in the manner herein provided and in the presence of such person or his representative.

"• • •

"Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:

"(a) In the prevention of waste as 'waste' is defined herein;

"(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

"Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to pro-

duce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month. As amended acts 1947, 50th Leg., p. 1059, ch 453, § 1.

"Sec. 13. In determining the daily allowable production for each gas well the Commission shall take into account *the size of the tract* segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; *and all other factors which are pertinent;* provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located *in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission.* In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

" • • •

"Sec. 16. It shall be unlawful for any person to produce gas from a gas well in violation of the valid orders of the Railroad Commission of Texas. As amended Acts 1947, 50th Leg., p. 1059, ch. 453, § 3.

" • • •

"Sec. 20. In the event the Commission finds that the owner of any gas well has failed or refused to utilize or sell the allowable production from his well when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir or zone in which same is located until the owner thereof signifies to the Commission his desire to utilize or sell such gas. In all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas.

"• • • •

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

"• • •

"Sec. 24. Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article, in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

"• • •"

Article 6008a.

"• • •

"Sec. 2. In any common reservoir in this State producing both sweet and sour gas, there shall never be produced from such common reservoir for utilization in carbon black manufacture, a maximum daily volume of sour gas from such gas wells in excess of seven hundred fifty million (750,000,000) cubic feet *which daily*

volume of sour gas from gas wells shall be prorated by the Commission among all the sour gas wells in such reservoir so as to prevent cognizable and preventable drainage of gas from tracts of land in such sour gas producing area segregated as to surface position and common ownership on which such sour gas wells are located; provided that if the daily demand for sour gas from gas wells for utilization in carbon black manufacture is less than the daily maximum allowable hereinabove permitted, the total daily volume of gas from gas wells from such sour gas area for utilization in carbon black manufacture shall be equal to such daily demand which demand shall be determined by the Commission and shall be prorated among all the sour gas wells in such area as hereinabove provided.

"• • •"

Article 6014.

"The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:

"• • •

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

"(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership.

"• • •"

Article 6015.

"All operators, contractors, or drillers, pipe line companies, or gas distributing companies, drilling for or producing crude oil or natural gas or piping oil or gas for any purpose shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil and gas or both, in drilling and producing operations, storage or in piping or distributing, and shall not wastefully utilize oil or gas, or allow same to leak or escape from natural reservoirs, wells, tanks, containers or pipes. Acts. 1919, p. 283."

Article 6029.

"The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

"(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

"• • •

"(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

"• • •"

Article 6036a.

"No rule, regulation or order shall be adopted by the Commission under the provisions of this Act or of Title 102 of the Revised Civil Statutes of Texas,

1925, as amended, dealing with the conservation of oil and gas and the prevention of the waste thereof, except after hearing upon at least ten (10) days notice given in the manner and form prescribed by the Commission; • • •."

Article 6042.

"Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, • • •."

Article 6049c.

"• • •

"Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. As amended Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2 § 8; Acts 1935, 44th Leg., p. 180, ch. 76, § 14.

"• • •"

"Sec. 11. • • • In the Court of Civil Appeals such court shall immediately and at as early a date as pos-

sible decide the questions involved therein; and in the event any question or questions shall be certified to the Supreme Court or writ of error thereto be requested or granted, it is here made the duty of the Supreme Court immediately to set down said cause for hearing and decide the cause at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character in such court."

Article 6049d.

"Sec. 4. Whenever the full production, from wells producing gas only, from any common source of supply of natural gas in this State is in excess of the reasonable market demand, the Railroad Commission shall inquire into the production and reasonable market demand therefor and shall determine the allowable production from such common source of supply, which shall be the reasonable market demand which can be produced without waste, and the Commission shall allocate, distribute or apportion the allowable production from such common source of supply among the various producers on a reasonable basis, and shall limit the production of each producer to the amount allocated or apportioned to such producer."

TEXAS SUPREME COURT RULES:

Rule 483. Order On Application For Writ Of Error

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the

notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'

"• • •"

Rule 499-a. Direct Appeals

"In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled 'An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency,' which act was passed by authority of an amendment known as Section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

"(a) In view of Section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of Sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

"(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State; when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

"(c) Such appeal shall be in lieu of an appeal to the Court of Civil Appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as

may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

"(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the Courts of Civil Appeals shall, in so far as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder. Promulgated by order of June 16, 1943, effective December 31, 1943."